85-441

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LILLIAN ROBERTS, as Commissioner
of Labor of the State of New York,

Appellant,

— against —

BURLINGTON INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Is an employer's agreement, contained in a simple personnel policy, to pay severance pay an "employee welfare benefit plan" subject to the preemption provision of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, so as to prohibit the Commissioner of Labor of the State of New York from enforcing an order issued pursuant to the state wage and benefit collection statute requiring the employer to pay benefits pursuant to its policy?*

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* The caption of the case in this Court does not contain the names of the individual plaintiffs, who were also appellants in the Court of Appeals for the Second Circuit. They will also docket an appeal to this Court. Their names are Irving Gilbert, Irene Prince, David J. Frank, Herbert R. Kaplan, Bernard B. Largman, Dora Nicolini, Herbert Peppel, Bertha Richie, David Schoeneck, Raquel R. Silensky, Marie Silvestri, Brenda Tillman Humphreys, B. Gaither Shaw, Jr., Robert S. Ahrens, Benjamin F. Blye, Jr., David H. Brunt, Jack R. Carpenter, Kenneth E. Eckard, Ronald F. Gauthier, Louis Gorelick, Jeremy Harris, Ronald H. Hicks, Robert D. Huddleston, Thomas R. Jerome, Gaston D. Lopez, Michael Loschenko, Phillip R. Mullins, Dorothy Novak, Anthony J. Petronis, Bernard Porvin, Charles A. Powers, Saul Roth, James A. Sbarboro, John Sells, James M. Stutts, and Gordon L. Van Dusen.

Appellant Commissioner of Labor of the State of New York and the above individual appellants submit herewith a separately bound joint appendix. The joint appendix is cited herein as (A-).

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit rendered its decision and entered judgment on June 17, 1985. (A-1). This decision is reported. *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985). ("Burlington II"). On September 17, 1984, the United States District Court for the Southern District of New York rendered a decision granting the motion to dismiss of defendant Burlington Industries, Inc. ("Burlington"), dismissing the complaint of appellant Lillian Roberts, Commissioner of Labor of the State of New York ("appellant" or "Commissioner"), and enjoining the Commissioner

from enforcing N.Y. Labor Law 198-c against defendant. (A-21). ("Burlington I"). This decision is not reported.

JURISDICTION

This is a civil action by 36 former employees of Burlington Industries, Inc. claiming severance pay under N.Y. Labor Law §198-c, state common law, and, alternatively, under the federal Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* The plaintiffs claimed the district court had diversity jurisdiction of the state law claims under 28 U.S.C. §1332 and federal question jurisdiction of the federal claims under 28 U.S.C. §1331.

The United States Court of Appeals for the Second Circuit held that N.Y. Labor Law §198-c was preempted by federal law, and it entered judgment on June 17, 1985. (A-1). No party sought a rehearing. The Commissioner filed a timely notice of appeal to this Court on September 11, 1985, in the United States Court of Appeals for the Second Circuit. (A-36).

This Court has jurisdiction of this appeal under 28 U.S.C. §1254(2).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001 *et seq.* ("ERISA"), United States Department of Labor regulation, 29 C.F.R. §2510.3-1, and N.Y. Labor Law §198-c are reprinted in the joint appendix (A-40).

STATEMENT OF THE CASE

1. Facts Material To Consideration Of The Question Presented

Plaintiffs were all formerly merchandising employees of Burlington's Socks and Hosiery Divisions in the company's New York office. *Burlington II* (A-4). In 1982, Burlington sold the Socks and

Hosiery Divisions as a going concern to Kayser-Roth Corporation and plaintiffs were terminated from Burlington. *Burlington II* (A-5). In order to ensure that those employees would accept employment with Kayser-Roth, Burlington agreed it would not permit them to transfer to other jobs with Burlington, and the company declined to rehire employees accepted by Kayser-Roth for at least six months after the sale. *Burlington II* (A-5). At the time they were terminated, the individual plaintiffs had worked for Burlington for between six and 26 years.

Shortly before the sale to Kayser-Roth, Burlington informed its terminated employees that they would not receive severance pay since Kayser Roth would employ them. *Burlington II* (A-7). The employees were denied severance pay whether or not they accepted jobs on the terms offered by Kayser-Roth.*

Since 1953, Burlington has paid severance pay to employees who are involuntarily terminated based on a written personnel policy. The policy was for many years contained in a company policy manual, distributed only to management employees.**

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* Since Kayser-Roth had no severance pay policy and refused to assume Burlington's policy, the plaintiffs were required to give up their rights to that benefit as a result of the sale.

** At the time of the sale, the company policy manual read, in relevant part:

I. Company Policy

A. General—The Company makes payroll severance payments and vacation severance payments to eligible salaried employees who are terminated from the Company.

B. Payment—Payroll severance payments are based upon tables contained in this policy. Vacation severance payments are based upon a person's length of continuous service with the Company less vacation taken or adjusted as defined by this policy.

II. Application of Policy

A. Payroll Severance—All regular full-time salaried employees who meet eligibility requirements are paid payroll severance based upon continuous service as shown in Exhibit A or Exhibit B.

(Footnote Continued)

Burlington II (A-5). Beginning in 1974, it was communicated to all employees through the Salaried Employees' Handbook.* *Burlington II* (A-6).

Burlington's severance pay policy was administered by Burlington itself through its personnel and payroll departments. Like vacation pay and other benefits of that type, severance pay by the company was automatic; there existed no application procedure. *Burlington II* (A-6). Severance payments were made out of Burlington's general assets. The company did not segregate any assets from which to pay severance pay and it maintained no fund, no trust or separate account, and no insurance from which severance payments were made. Severance payments were treated like wages; all legal withholding deductions, such as income tax and social security tax, were made from the payments.

Although Burlington had been aware of ERISA's requirements since at least 1975, and conformed certain of its policies to it, not until after the sale did Burlington treat its severance pay policy as governed by ERISA. Only after the plaintiffs began filing claims for severance pay with the New York State Department of Labor did it provide its remaining employees with a "summary plan description," as required by ERISA, or advise them

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> l. Eligibility – Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are *involuntarily terminated from the Company*. Eligibility requirements are:
>
> a. Job Elimination – This category consists of terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes. (emphasis added).

* The Handbook provided at the time of the sale:

> The company provides severance pay to full time employees who *involuntarily leave the company*. Pay ranges from two weeks to 12 months, based on the employee's age and length of continuous service with the company. Fraud or other behavior deemed to be willful could disqualify an employee from receiving severance benefits. (emphasis added).

of their rights under ERISA. At no point did Burlington hold any assets in trust or appoint any trustees to manage the policy, as ERISA demands. Similarly, Burlington did not designate a fiduciary for the policy, publish or file an annual report, a financial statement, or a plan description, as required by ERISA. *Burlington II* (A-6).

2. The Course Of Proceedings And Disposition In The Courts Below

The individual plaintiffs commenced this action on September 22, 1983 to recover severance pay. *Burlington I* (A-25). They alleged seven causes of action under state law, including causes of action under N.Y. Labor Law 198-c and for breach of contract, and four causes of action under ERISA. *Burlington II* (A-4).

Before commencing this action, ten of the plaintiffs along with other former employees of Burlington, had filed administrative claims for severance pay with the New York State Department of Labor pursuant to N.Y. Labor Law 198-c.* *Burlington I* (A-24). The Commissioner, after investigation and a compliance conference, issued an order on September 2, 1983, directing Burlington to pay the claimants severance pay in accordance with its policy. *Burlington II* (A-24-A-25). Pursuant to N.Y. Labor Law §101, Burlington filed a petition for review of that order with the New York State Industrial Board of Appeals. It challenged the order on a number of grounds including the claimed preemption of §198-c by ERISA. *Burlington I* (A-25).

On December 2, 1983, Burlington filed a motion to dismiss and for summary judgment in this action, claiming that the state law causes of action were preempted by ERISA and that it was entitled to summary judgment on the ERISA causes of action.

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* Section 198-c makes it a misdemeanor not to pay benefits or wage supplements, defined to include severance pay, due employees. (A-51). The Labor Law also provides an administrative procedure, utilized by the employees in this case, for the Commissioner of Labor to enforce an employer's obligation to pay benefits.

Burlington I (A-25). On January 5, 1984, the Commissioner was granted leave to intervene. *Burlington I* (A-25). The Commissioner opposed the motion to dismiss upon several grounds one of which was that, because Burlington's severance pay policy was a simple agreement between Burlington and its employees, it was not an "employee welfare benefit plan" subject to ERISA and the state was not preempted from enforcing it.* *Burlington I* (A-27). The Commissioner relied on a United States Department of Labor ("USDOL") regulation which excluded from ERISA's coverage employer compensation practices in which the payments were made to the employee directly from the employer.

On September 17, 1984, the district court issued a decision and order, granting Burlington's motion to dismiss the state law causes of action, denying its motion for summary judgment on the ERISA causes of action, and permanently enjoining the Commissioner from enforcing the compliance order against Burlington. *Burlington I* (A-21, 31). The district court held that Burlington's policy was an ERISA plan because it provided benefits of the type enumerated in §3(1) of ERISA, 29 U.S.C. §1002(1).** *Burlington I* (A-28). It indicated that to hold that Burlington's policy was not an ERISA plan would have the effect of permitting employers to evade liability under ERISA simply by failing to comply with it. *Burlington I* (A-29). The court did not address the applicability of the USDOL regulation relied upon by the Commissioner. The Commissioner filed a notice of appeal from the order on October 9, 1984.

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* Under §514 of ERISA, 29 U.S.C. §1144, only state laws which relate to an "employee benefit plan" as defined in ERISA are preempted. (A-49). Thus, if Burlington's severance pay policy is not a "plan" as defined by ERISA, the state may enforce its state law requiring Burlington to pay severance pay.

** Benefits which may be the subject of an ERISA plan under §3(1) include "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, prepaid legal services," holiday, and severance benefits. 29 U.S.C.§1002(1). The latter two benefits are included by virtue of ERISA's incorporation of the benefits described in §302(c) of the Taft-Hartley Act, 29 U.S.C. §186(c).

On October 30, 1984, the district court entered a judgment under Fed. R. Civ. P. 54(b) dismissing the plaintiffs' state law claims and the Commissioner's complaint in intervention. (A-34). The Commissioner and the plaintiffs filed notices of appeal from the judgment on November 1 and 2, 1984, respectively. The three appeals were consolidated.

On June 17, 1985, the Second Circuit Court of Appeals affirmed the district court. *Burlington II* (A-1). The court also held that Burlington's severance pay policy is an employee benefit plan covered by ERISA because it provided a benefit enumerated in ERISA's definition of employee welfare benefit plan and that, therefore, the state is preempted from ordering Burlington to pay severance pay. *Burlington II* (A-10). The court rejected the argument of plaintiffs, the Commissioner, and the amici* that a promise or agreement between an employer and its employees to pay benefits does not constitute a welfare benefit plan within the meaning of ERISA. The court expressly declined to reach the issue of whether Burlington's policy fell within the scope of the USDOL regulation and was, for that reason, excluded from ERISA's coverage. *Burlington II* (A-13).** The Commissioner filed a timely notice of appeal to this Court on September 11, 1985. (A-36).

REASONS THIS COURT SHOULD GRANT PLENARY CONSIDERATION OF THE SUBSTANTIAL QUESTION PRESENTED BY THIS APPEAL

This Court should grant plenary consideration for two reasons. First, this case raises a substantial issue of federal preemption

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* The Commissioner and plaintiffs were joined on the appeal by ten states and the District of Columbia that filed a brief as *amici curiae*.

** The Commissioner and the plaintiffs also claimed in both the district court and the court of appeals that, even if Burlington's personnel policy was an ERISA plan, N.Y. Labor Law §198-c was not preempted because it did not regulate the terms and conditions of such a plan, but only enforced the plan's own terms. Therefore, it was argued, the state law did not "relate to" a plan within the meaning of ERISA's preemption provision, 29 U.S.C. §1144. The Commissioner does not raise that issue on this appeal.

never before addressed by this Court. Second, the issue is an important one having nationwide impact.

This Court has more than once construed ERISA's preemption provision, most recently addressing the exception for state insurance regulation in *Metropolitan Life Insurance Co. v. Massachussets*, ____ U.S. ____, 105 S. Ct. 2380 (1985). It has on several occasions considered the reach of ERISA's language preempting state laws which "relate to" employee benefit plans. Nonetheless, it has never construed the scope of the term "employee benefit plan". This case, involving as it does the question whether a simple personnel policy issued by an employer to its employees is an ERISA "employee benefit plan" so as to preclude the state from enforcing the employer's obligation under state law to adhere to its policy, raises such an issue.

The ERISA definition of "employee benefit plan" is vague.* If it is to be given the elastic interpretation assigned to it by the court below, it could cover any employer promise in a personnel manual to pay any type of compensation, other than straight wages, to employees. For example, as construed by the court below, the ERISA definition of "employee benefit plan" could arguably be interpreted to include even a promise by an employer to give its employees a paid holiday for Martin Luther King's Birthday or to provide its employees with a day of paid sick leave.

ERISA, however, as the United States Department of Labor has recognized in interpretive regulations, was intended and crafted to regulate "plans" not "employers", with the word "plan" having a particular meaning. Congress did not intend that the term "plan" cover obligations which extend directly from an employer to its employees. The subject of its concern was obligations to employees incurred by an entity apart from the employer.

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* While the definition is worded broadly, it nevertheless indicates a distinction between an employer and a plan since it speaks of a "plan, fund, or program" "established or maintained" by an employer, and it does not include compensation practices of an employer. 29 U.S.C. §1002(1). (A-40).

Until ERISA's passage, this relationship was essentially unregulated, and employees' legitimate expectations as to benefit obligations were often unsatisfied.

Congress was well aware that employees who were denied benefits because of plan technicalities, plan mismanagement, or inadequate funding of plans had no recourse because employers were not directly liable for plan benefits. Thus, Congress in ERISA set standards for "plans," intended to protect the security of employee benefits for which the plans were obligated, and it provided a remedy, where none had previously existed, for employees who were denied expected benefits.

However, in doing so, Congress did not, as this Court has recognized, intend to supplant or extinguish any rights and remedies which employees held, long before ERISA's enactment, against employers who failed to satisfy their own obligations to pay benefits. The interpretation of the court below has precisely that effect. It obliterates employees' state statutory remedies which in New York and number of other states include effective administrative enforcement mechanisms. Worse yet, it nullifies the right of employees to sue their employers for breach of contract under state law. There is no indication in ERISA's history that Congress intended to clog the federal courts with employee claims for severance pay, vacation pay, holiday pay, and any other promised benefit. Congress' intent was to provide a new remedy, not to deprive workers of their traditional remedies against employers. Were the latter Congress' intent, many of ERISA's provisions would be superflous and irrelevant.

Plainly, then, this case raises important issues which have nationwide impact. No fewer than 23 states have laws similar to N.Y. Labor Law §198-c which provide state remedies against employers who fail to live up to their commitments to pay benefits. Other states recognize common law breach of contract remedies against employers for wages and benefits. Hundreds of thousands of workers rely upon such remedies. The interpretation given ERISA by the court of appeals would invalidate each of these state laws and state common law and relegate workers

to federal court actions, imposing on them the burden of proving that their employers acted in an arbitrary and capricious manner, in order to recover even one day of severance pay. Congress did not intend such a result.

I. THIS COURT SHOULD GRANT PLENARY CONSIDERATION TO RESOLVE A SUBSTANTIAL QUESTION OF FEDERAL PREEMPTION NEVER BEFORE ADDRESSED BY THIS COURT WHICH WAS RESOLVED BY THE COURT BELOW IN CONFLICT WITH CONGRESSIONAL INTENT AND PRINCIPLES ENUNCIATED BY THIS COURT.

A. CONTRARY TO THE DECISION OF THE COURT BELOW, CONGRESS DID NOT INTEND THAT ERISA REGULATE EMPLOYER PROMISES TO PAY BENEFITS TO EMPLOYEES.

1. Congress Intended ERISA To Regulate The Unregulated Field of Benefit Plans.

The legislative history of the Employee Retirement Income Security Act demonstrates unequivocally that Congress viewed ERISA as regulating entities separate and distinct from employers. Even though such entities were established by employers (and sometimes unions), they had a legal existence of their own in which they, not the employers who established them, were liable for payment of benefits. In 1974, after extended study, Congress enacted the Employee Retirement Income Security Act to protect the interests of participants in employee benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). One of the central purposes of ERISA was to prevent the " 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 374 (1980).

The subject of congressional concern, the benefit plan, was a "relatively modern economic institution" which had become an important social and economic factor only since the mid-1940's. H. Rep. No. 93-533, reprinted in [1974] U.S. Code Cong. & Ad.

News 4639, 4640. Benefit plans, Congress found, were subject to only minimal, inadequate federal regulation* and were virtually unregulated by state legislation. *Id.* at 4641-42. *See* Senate Committee on Labor and Public Welfare, Final Report on Welfare and Pension Plans Investigation, S. Rep. No. 1734, 84th Cong., 2d Sess. 68 (1956); Senate Committee on Labor and Public Welfare, Interim Report of Activities of the Private Welfare and Pension Plan Study, S. Rep. No. 634, 92nd Cong., 2d Sess. (1972). The plan participants were left to rely upon the state common law of trusts, codified in only a few states, which Congress found inadequate because state law, like existing federal law, did not protect the security of benefits.

Employers' compensation practices, on the other hand, were not a recent phenomenon and had for decades been thoroughly supervised by state courts and administrative systems, pursuant to legislation and common law contract principles.** Congress' concern thus was not with enforcing *employer* contractual obligations to employees, but with the inability or unwillingness of *benefit plans* to meet their benefit obligations to participants because of overly strict vesting requirements, inadequate funding, and misfeasance and malfeasance by the administrators and trustees.***

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* Not until 1958 did Congress enact legislation, the Welfare and Pension Plans Disclosure Act, repealed by ERISA, which was specifically designed to regulate benefit plans. By requiring the disclosure of information about plans, the Act was intended to permit the participants to protect themselves. However, without substantive standards for plan operation, its intent was not fully achieved. *Id.* at 4641-42.

** New York State has regulated employer compensation practices since the 19th century. 1897 N.Y. Laws ch.415 §9.

*** In 1971, the Senate Committee on Labor and Public Welfare reported on a number of case histories illustrating these flaws in the private benefit plan system. For example, in one case, a joint union-employer trust plan had no vesting provision and had $800,000 in loans outstanding for which there was no collateral. Similarly, the Senate Committee pointed to a major aerospace company's pension plan in which 20,000 out of 60,000 participants left the plan

(Footnote Continued)

In ERISA, therefore, Congress prescribed minimum standards of vesting, funding, and fiduciary conduct to minimize the risk that workers would lose expected benefits, 29 U.S.C. §§1053, 1082, and 1102-04. It provided a system of compulsory benefit insurance to protect the security of benefit rights in the event of benefit plan termination. 29 U.S.C. §§1321-23. Congress also created a right of action in federal court for employees to recover benefits due from a plan. 29 U.S.C. §1132(a) and (f). Such provisions would have been superflous and unnecessary if Congress' intent in ERISA had been to regulate an employers's contractual liability to its employees and provide a remedy for an employer's breach of its contract obligations.

The problems which ERISA was enacted to remedy – the lack of employee knowledge about plan terms and conditions, and the risk of loss of benefits in the event of plan termination because of underfunding, lack of vesting provisions, and negligent or fraudulent plan management – were problems which prior to ERISA had no adequate remedy in the law. There existed no federal, and only a few state, statutes providing a right for an employee to sue a plan and, even if an the employee did so under state law, the common law of trusts which was generally applied to that type of a claim was not adequate to protect the employee's rights.* *See* Senate Committee on Labor and Public Welfare, Final

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(Footnote Continued)
without entitlement to any benefit, even though one-fourth of those 20,000 had over five years of service. Furthermore, that plan's liabilities exceeded its assets by more than $75 million. Thus, the Report concluded, "if the plan were to terminate today, employees with vested benefits would have no legal remedy to obtain all their vested benefits." *Id.*, Appendix at 138. Congress' view that no remedy existed in such cases plainly shows that it did not intend to include within ERISA's coverage employer agreements with employees to pay benefits since those agreements could be enforced under state statutes and common law.

* The Report on the House version of ERISA states:

> In almost every instance, participants lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed with respect to its contractual requirements of vesting or funding. *Courts strictly interpret the plan*

(Footnote Continued)

Report on Welfare and Pension Plans Investigation, S. Rep. No. 1734, 84th Cong., 2d Sess. 65-68 (1956).

2. Congress Did Not Intend ERISA To Supplant And Nullify Direct Employer Liability For Employee Benefits.

Congress was well aware that employers, once having established a plan, had no financial responsibility for benefit payments beyond the contributions they were committed to make.* Senate Committee on Labor and Public Welfare, Interim Report of Activities of Private Welfare and Pension Plan Study, S.Rep. No. 634, 92nd Cong., 2d Sess. 74 (1972). Given that understanding and the fact that states had been regulating employer compensation practices for decades, it is plain that ERISA was not intended to regulate employer-employee agreements involving

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(Footnote Continued)

> *indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording.* Thus, under present law, accumulated pension credits can be lost even when separated employees are within a few months, or even days, of qualifying for retirement. (emphasis added).

H. Rep. No. 93-533, reprinted in [1974] U.S. Code Cong. & Ad. News at 4643.

* Representative Erlenborn commented:

> At the present time the legal foundation of pension plans is that the employer sets up a pension trust and promises to make periodic contributions into that trust. If there are sufficient assets, the employee will get the pension that has been described; if there are not, he does not get it; he gets something less. But the employer up until the present time generally has not made a promise to pay the pension, only to make periodic contributions.

120 Cong. Rec. 4285 (Feb. 2, 1974), reprinted in 2 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. 3388 (Comm. Print 1976).

benefits, and nothing in its text indicates otherwise.* To the extent Burlington's policy constitutes a direct obligation of Burlington to pay benefits to its employees, it is not therefore governed by ERISA.

That ERISA does not regulate or limit an employer's contractual obligations to its employees was noted by this Court in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980). In *Nachman*, the Court found a difference between "plan liability" for benefits and "direct employer liability" for benefits. The employer in *Nachman* had disclaimed liability in the plan document for payment of benefits. When the plant closed and the plan was terminated, the plan had only enough assets to cover 35 percent of the vested benefits. ERISA provides insurance for such terminations through the Pension Benefit Guaranty Corp. ("PBGC") but imposes reimbursement liability on the employer for benefits paid by PBGC for up to 30 percent of the employer's net worth.

Nachman asked the court for a declaration that it had no reimbursement liability. It had itself disclaimed liability for any benefits beyond those the plan funds could satisfy, and the plan could not satisfy the full amount of the benefit obligations. The employees, Nachman argued, had no rights to the full amount; therefore, it had no reimbursement liability.

Holding that a plan's liability governed by ERISA and addressed by plan termination insurance is separate from an employer's direct liability for benefits, this Court rejected the employer's argument. It did not agree that only if an employer is directly liable for the benefit payments does it have reimbursement liability under ERISA. *Id.* at 359 n. 29. The Court

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** The statutory provisions are directed to the regulation of a "plan" as an entity apart from an "employer." *See* 29 U.S.C. §§1022 and 1102. (A-45-A-47). Under ERISA, the plan is to have a plan administrator who is required to publish and file an annual report for the plan, 29 U.S.C. §§1023 and 1024. A plan may sue and be sued and a judgment against a plan is not enforceable against the employer who established it. 29 U.S.C. §§1132(d)(1) and (2). (A-48). ERISA also prohibits certain transactions between a plan and the employer. 29 U.S.C. §§1106(a) and 1107.

distinguished clearly between the rights of employees to benefits which are enforceable against the plan and the rights employees may enforce directly against their employer. It concluded that even if an employer by agreement limits its direct liability for benefit payments to employees, it does not by doing so limits its employees' rights against the plan, rights which are regulated by ERISA. *Id.* at 378. The employer's disclaimer operated to protect it only from direct liability for benefit claims, and, indeed, this Court noted, had the employer not disclaimed liability, "the employee could sue the employer directly." *Id.* at 359 n. 29.

What the court below held, that direct employer liability for benefits is supplanted by ERISA, is therefore at odds with this Court's interpretation in *Nachman*. *Nachman* distinguished between plan liability and employer liability and acknowledged that, in the absence of a disclaimer by the employer, employees could sue their employer directly. Given this Court's acknowledgement that ERISA governs the liability of a plan for benefit payments, but does not alter the direct liability of an employer for benefits, the decision of the court below is simply incorrect. That decision merges employer liability for benefits into plan liability for benefits. In essence, it compels the conclusion that employees, as a result of ERISA, have no right to enforce direct employer liability for benefits.* Such a conclusion, as noted, places the court below in conflict with this Court's view of ERISA enunciated in the *Nachman* case.**

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* By preempting N.Y. Labor Law §198-c and state breach of contract law, the court below has limited employees who are owed any benefits by an employer to suing a "plan" under ERISA. Since generally, under ERISA, the decision of an administrator of a benefit plan to deny benefits is subject to reversal only if it is arbitrary and capricious, made in bad faith, or unsupported by substantial evidence, an employee, after the court of appeal's decision, will have to prove much more than simply that the employer defaulted on a promise.

** Three other circuit courts have decided cases involving the claimed preemption of state laws which enforce employer promises to pay benefits. Those courts have, like the court below, held that an employer's personnel policy is an ERISA plan merely because it provided a benefit described in ERISA. *Slack v. Burlington Industries, Inc.*, Nos. 84-2241(L) and 2257, slip op. at 11-12 (4th Cir.

(Footnote Continued)

B. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH UNITED STATES DEPARTMENT OF LABOR REGULATIONS INTERPRETING ERISA.

The potentially unlimited breadth of ERISA's definition of "employee welfare benefit plan" prompted the United States Department to Labor ("USDOL") to issue a clarifying interpretation, interpreting the definition of "plan" to exclude employer practices in which an employee receives compensation directly from employer assets. 29 C.F.R. §2510.3-1. (A-49). The court below declined to determine whether Burlington's severance pay policy is excluded from ERISA's coverage by virtue of the USDOL regulation on the ground that the court had "concluded for other reasons that an unfunded severance pay policy is included within the definition of 'welfare plan'." *Burlington II* (A-13). However, since an agency's interpretation of the statute it administers is entitled to due deference and since the USDOL regulation interprets the term "employee welfare benefit plan" for purposes of ERISA coverage, if the regulation applies to Burlington's policy then that policy is simply not covered by ERISA and the "other reasons" which the court below found to support its conclusion would not sustain its holding.*

(Footnote Continued)
Sept. 3, 1985); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), *aff'g.*, 491 F.Supp. 1188, 1196 (E.D.Mo. 1980), *cert. denied*, 454 U.S. 968, 1084 (1981). *But see California Hospital Association, et al. v. Henning*, Nos. 83-6381 and 6416 (9th Cir. Sept. 6, 1985). These cases do not discuss the argument made by appellant herein that Congress did not intend ERISA to supplant direct employer liability for employee benefits.

* As noted, the court's analysis focussed on whether severance pay was one of the benefits enumerated in §3(1)(A) or §3(1)(B) of ERISA. The court held severance pay fit within §3(1)(A) because it is an "unemployment benefit" and within §3(1)(B) which incorporates severance pay as a benefit described in § 302(c) of the Taft-Hartley Act, 29 U.S.C. §186(c). The Court rejected the plaintiffs' argument that only "funded severance pay plans" are covered by §302(c) and, thus, by ERISA, as well as the plaintiffs' contention that a benefit promised because of years of service and not expressly conditioned on a period of unemployment is not an "unemployment benefit."

While the regulation, in listing certain specific practices which are excluded from ERISA coverage because they are not considered "plans", does not expressly mention severance pay, as the court below recognized, the list was not meant by the USDOL to be exhaustive. *Burlington II* (A-13).* Specifically included among the practices excluded from ERISA's coverage are sick leave pay, 29 C.F.R. §2510.3-1(b) (2), (A-50) and holiday and vacation pay, 29 C.F.R. §2510.3-1(b) (3)(i), (A-50) each of which is, like severance pay, a benefit enumerated in the section of ERISA describing the benefits which may be the object of an ERISA plan. 29 U.S.C. §1002. The USDOL excluded such practices from ERISA coverage because they are "associated with regular wages or salary," and, furthermore, because "the abuses which created the impetus for the reforms in [ERISA] were not in this area, and there is no indication that Congress intended to subject these practices to [ERISA's] coverage," notwithstanding that the broad language of the definition of "plan" could arguably cover them. Notice of Proposed Rulemaking, 40 Fed. Reg. 24642, 24642-43 (June 9, 1975).

However, according to the USDOL regulation, these practices are excluded from ERISA only if the compensation is paid directly from the employer. This is in accord with congressional intent. Where there exists an entity other than the employer liable for the payments, the concerns of Congress would, of course, favor ERISA coverage. Where, however, the employer itself is obligated to make such payments, the need for a special ERISA remedy to protect the security of the employees' benefits does not exist because the employer may be sued directly for the benefits, and the ERISA remedy adds nothing to that long-established right.

Although the USDOL regulations do not specifically refer to severance pay, there is no logical basis for distinguishing it from

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* The regulation reads, in part:

> Some of the practices listed in this section as excluded from the definition of "welfare plan"... are inserted in response to questions received by the Department of Labor and, in the Department's judgment, do not represent borderline cases under the definition in section 3(1) of the Act.

the practices which are stated to be within ERISA's coverage. Severance pay, under Burlington's policy, is compensation paid directly by the employer out of its general assets, and it is treated by Burlington as regular wages. It is an obligation for which Burlington itself, and not a plan, is liable. The failure of the court below to find that Burlington's policy is, under the USDOL interpretation, excluded from ERISA's coverage requires reversal.

II. THIS COURT SHOULD GRANT PLENARY CONSIDERATION BECAUSE THE ISSUES ARE OF GREAT IMPORTANCE TO A LARGE NUMBER OF OTHER STATES AND TO HUNDREDS OF THOUSANDS OF EMPLOYEES.

This appeal also merits plenary consideration to resolve the substantial issue presented concerning the continuing validity of state benefit collection statutes which operate in at least 23 states* and the state common law breach of contract rights of workers

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* Each of the following states, like New York, make it a violation of state statutory law for an employer to refuse to pay agreed-upon benefits to employees. California, Cal. Labor Code §§227, 227.3 (West 1971 & Supp.1985); Connecticut, Conn.Gen.Stat. Ann. §§31-72 (West 1972 & Supp. 1985); Delaware, Del.Code Ann. tit.19, §1109 (1979); Illinois, Ill.Ann.Stat. ch.48, §§39m-2–39m-11 (Smith-Hurd Supp. 1985); Iowa, Iowa Code Ann. 91A.2 (West 1984); Kansas, Kan.Stat.Ann. §§44-313 (1981); Kentucky, Ky.Rev.Stat. §§337.010-337.060 (1983); Maine, Me.Rev.Stat.Ann. tit. 26, §629-A (West Supp. 1984-1985); Michigan, Mich.Comp.Laws Ann. §408.473 (West 1985); Minnesota, Minn.Stat.Ann. §181.74(West Supp. 1985); Montana, Mont.Rev.Codes Ann. §39-3-201 (1983); New Hampshire, N.H. Rev. Stat. Ann. §275: 43(III)(Supp. 1983); New Jersey, N.J. Stat.Ann. §2A:170-90.2 (West 1971); New Mexico, N.M. Stat.Ann. §§50-4-19–50-4-30 (1978); North Carolina, N.C. Gen. Stat. §§95-25.2–95-25.6 (1981); Ohio, Ohio Rev.Code Ann. §§4113.15 (Page 1980); Oklahoma, Okla.Stat.Ann. tit.40 §165.1 (West 1954 & Supp. 1984-1985); Pennsylvania, Pa.Stat.Ann. tit.43 §260.29(Purdon Supp. 1985); Vermont, Vt.Stat.Ann. tit.21, §345a (1978); West Virginia, W. Va. Code §§21-5-1–21-5-6 (1981); Wisconsin, Wis.Stat.Ann. §109.01 (West Supp. 1984-1985); District of Columbia, D.C. Code Ann. §§36-101–36-110 (1981).

which exist in most, if not all, states. The resolution of the question presented, therefore, will have an impact on hundreds of thousands of workers.*

Without access to state law remedies to recover benefits due directly from their employers, employees will be forced to commence an action under ERISA in federal or state court to recover even one week's worth of severance pay. ERISA contains no administrative enforcement procedure; an employee seeking to recover benefits due from a plan must under ERISA commence a civil court action. 29 U.S.C. §1132(a). Furthermore, having done so, the employee must be prepared to prove, not merely that the plan defaulted, but that the plan's refusal to pay benefits was arbitrary. *Burlington II* (A-18-A-19). Depriving workers of their right to avail themselves of either state administrative enforcement procedures or state common law will work a tremendous hardship. In New York alone, in the five-year period from 1980-1984, the New York State Department of Labor handled 16,453 employee claims for wage supplements under §198-c, and collected $3,073,144 in unpaid benefits from employers.** Were the decision of the court below to stand, these employees would be required to either forego enforcement of their benefit rights or retain counsel and sue in court, even though the amount of any individual claim is generally small. Neither result was intended by Congress.

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* Notwithstanding the decision of the court below, workers who are represented by unions retain their breach of contract rights by virtue of §514(d), of ERISA, 29 U.S.C. §1144(d), which saves from preemption "any law of the United States." Unionized workers protected by the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, have the right to arbitrate any claims for benefits covered by their collective bargaining agreements and to sue for breach of contract under the Taft-Hartley Act, 29 U.S.C. §185. However, as of 1984, unionized workers comprised only 20.1% of the working population. U.S. Bureau of Labor Statistics, *Employment and Earnings* (1985). Moreover, workers whose right to organize is protected only by state law, *e.g.*, those not engaged in interstate commerce, would, like non-unionized workers, be deprived of their breach of contract rights by the decision of the court of appeals.

** The State Department of Labor does not handle employee claims for benefits against funded plans. Such claims are referred to the U.S. Department of Labor.

CONCLUSION

For all the foregoing reasons, this Court should summarily reverse or grant plenary consideration of the substantial question presented by this appeal.

Dated: New York, New York
September 13, 1985

Respectfully submitted,

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85-441
85-460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Supreme Court, U.S.
FILED
SEP 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

IRVING GILBERT, et al., and LILLIAN ROBERTS,
as Commissioner of Labor of the State of New York,

Appellants,

– against –

BURLINGTON INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX TO JURISDICTIONAL STATEMENTS

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 902, 943, 953 — August Term, 1984

(Argued: March 11, 1985 Decided: June 17, 1985)

Docket Nos. 84-7824, 84-7908, 84-7914

IRVING GILBERT, IRENE PRINCE, DAVID J. FRANK, HERBERT P. KAPLAN, BERNARD H. LARGMAN, DOROTHY MIHALKER, DORA NICOLINI, HERBERT PEPPEL, BERTHA RICHIE, DAVID SCHOENECK, RAQUEL R. SILENSKY, MARIE SILVESTRI, BRENDA TILLMAN HUMPHREYS, B. GAITHER SHAW, JR., NORMAN J. WILLIAMS, ROBERT E. AHRENS, BENJAMIN F. BLYE, JR., DAVID H. BRUNT, JACK R. CARPENTER, KENNETH E. ECKARD, RONALD F. GAUTHIER, LOUIS GORELICK, JEREMY HARRIS, RONALD H. HICKS, ROBERT D. HUDDLESTON, THOMAS R. JEROME, GASTON D. LOPEZ, DOROTHY NOVAK, ANTHONY J. PETRONIS, BERNARD PORVIN, CHARLES A. POWERS, SAUL ROTH, JAMES A. SBARBORO, JOHN SELLS, JAMES M. STUTTS, and GORDON L. VAN DUSEN,

Plaintiffs-Appellants,

LILLIAN ROBERTS, as Commissioner of Labor of the State of New York,

Plaintiff-Intervenor-Appellant,

—v—

BURLINGTON INDUSTRIES, INC.,

Defendant-Appellee.

Before:

TIMBERS, CARDAMONE and PIERCE,
Circuit Judges.

Appeal by 36 plaintiffs, former employees of appellee Burlington Industries, and an appeal by the New York State Commissioner of Labor, as intervenor, both from a judgment entered in the United States District Court for the Southern District of New York (Brieant, J.) on October 30, 1984. The judgment dismissed plaintiffs' state law claims for severance pay benefits on the grounds that they were preempted by ERISA and dismissed the intervenor's complaint for the same reason.

Affirmed.

VICTOR RABINOWITZ, New York, New York (Emily Bass, Terry Gross, Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C., New York, New York, of Counsel), *for Plaintiffs-Appellants.*

JANE LAUER BARKER, Deputy Bureau Chief, New York, New York (Robert Abrams, Attorney General of the State of New York, Robert Hermann, Solicitor General, O. Peter Sherwood, Deputy Solicitor General, Carlin Meyer, Assistant Attorney General in Charge of Labor Bureau, New York, New York, of Counsel), *for Plaintiff-Intervenor-Appellant.*

DANIEL RIESEL, New York, New York (Lawrence R. Sandak, Sive, Paget & Riesel, P.C., New York, New York, of Counsel), *for Defendant-Appellee.*

Lacy H. Thornburg, North Carolina Attorney General, Tiare B. Smiley, Assistant Attorney General, Department of Justice, Raleigh, North Carolina, John C. Brooks, North Carolina Commissioner of Labor, Thomas A. Harris, Director, Wage and Hour Division, North Carolina Department of Labor, Raleigh, North Carolina, *filed a Brief for Amici Curiae for the States of Alaska, Connecticut, Hawaii, Illinois, Maryland, Montana, North Carolina, Oklahoma, Vermont, Wisconsin, and the District of Columbia.*

CARDAMONE, *Circuit Judge*:

We review on this appeal an employer's severance pay policy to decide whether it is an ERISA plan that preempts a state from ordering an employer to pay benefits to departing employees. By the terms of the employer's manual, eligibility to receive severance pay was limited to those employees "involuntarily terminated" from the company, *i.e.*, separated from the employer's payroll and not later reemployed by the company. Eligibility for benefits thus was to be determined by the discontinuity of an employee's employment—its severance—and not by the duration of unemployment, however fleeting that might be. Here, there was a purchase of one of the company's operating divisions as a going concern; plaintiffs are employees of that division. For plaintiffs this was not a temporary leave-taking, but a permanent parting-of-the-ways with their former employer. For the reasons discussed below, we hold that the employer's severance pay plan is an employee benefit plan under ERISA and that the state is preempted from granting benefits to plaintiffs. Plaintiffs

must seek relief from what they consider to be an arbitrary denial of their severance benefits under federal, not state, law.

I

Facts and Proceedings Below

Plaintiffs, 36 former employees of Burlington Industries, a textile manufacturer, have brought suit against Burlington claiming that severance pay is owed them upon termination of their employment. In their complaint plaintiffs assert eleven claims, seven seek relief under state law and four under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* (ERISA or Act). The state law claims include causes of action under New York Labor Law § 198-c, North Carolina General Statutes § 95-25, and common law theories of fraud, unjust enrichment, promissory estoppel, quantum meruit, and breach of contract. Prior to the commencement of this action, a number of the present plaintiffs filed claims with the New York State Department of Labor and obtained an order from the Commissioner of Labor that directed Burlington to pay them severance benefits. When Burlington appealed this ruling to the State Industrial Board of Appeals and sought a stay of the Commissioner's order, plaintiffs commenced the instant federal action in which the State Commissioner was later granted leave to intervene as a party plaintiff.

This appeal is from a judgment, entered in the United States District Court for the Southern District of New York (Brieant, J.) on October 30, 1984, which dismissed plaintiffs' state law claims on the grounds of preemption, dismissed the complaint made by the New York

State Commissioner of Labor as intervenor for the same reason, and enjoined the Commissioner from enforcing compliance orders she had issued against Burlington. Plaintiffs' four claims that seek relief under ERISA were not dismissed.

Although plaintiffs worked in 16 different states, they all reported to Burlington's merchandising headquarters in New York. In 1982 Burlington sold its operation as a going concern to Kayser-Roth. The employees continued to do the same work as they had before the sale. In order to ensure that its employees would accept employment with Kayser-Roth, Burlington agreed not to retain employees Kayser-Roth wished to hire, and also agreed not to rehire them for at least six months after the sale. Plaintiffs contend that they were employed by Kayser-Roth at a lower rate of compensation, while Burlington argues that the benefit package paid its former employees was comparable to their previous earnings.

Burlington's severance pay policy was contained in a manual that was not distributed to employees. The policy reads, in relevant part:

I. Company Policy

A. General—The Company makes payroll severance payments and vacation severance payments to eligible salaried employees who are terminated from the Company.

B. Payments—Payroll severance payments are based upon tables contained in this policy. Vacation severance payments are based upon a person's length of continuous service with the Company less vacation taken or adjusted as defined by this policy.

II. Application of Policy

A. Payroll Severance—All regular full-time salaried employees who meet eligibility requirements are paid payroll severance based upon continuous service as shown in Exhibit A or Exhibit B.

1. Eligibility—Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are *involuntarily terminated from the Company.* Eligibility requirements are:

a. Job Elimination—This category consists of terminations due to circumstances such as elimination or modification of operations or other *job elimination* due to bona fide organizational changes (emphasis added).

. . .

A summary description of the severance policy was contained in an employee handbook, which read:

> The Company provides severance pay to full time employees who *involuntarily leave the company.* Pay ranges from two weeks to 12 months, based on the employee's age and length of continuous service with the company. Fraud or other behavior deemed to be willful could disqualify an employee from receiving severance benefits (emphasis added).

The granting or denial of severance pay was automatic upon termination. Plaintiffs allege that Burlington never sought to comply with ERISA respecting its severance pay policy. That is, they claim that: it never published or filed an annual report, a financial statement, a plan description or a statement of plan modifications; it did not designate a fiduciary for the plan or inform employees of their rights under ERISA and the plan; there was no

established claims procedure; and, apart from the company's "open door" grievance policy, there was no established appeals procedure. The first time Burlington filed the required annual ERISA disclosure report regarding severance pay was after plaintiffs filed claims with the New York State Department of Labor.

Shortly before the sale to Kayser-Roth, Burlington's employees were informed that they were deemed ineligible for severance benefits, whether or not they accepted a position with Kayser-Roth. Although plaintiffs were never unemployed, as they immediately accepted positions with Kayser-Roth, they claimed they were entitled to severance pay under the plain language of the company's policy. When Burlington refused to make severance payments, ten of the present plaintiffs asserted before the State Department of Labor that they were entitled to severance pay, and the Commissioner issued orders under the New York Labor Law requiring Burlington to pay such benefits. Burlington petitioned the State Industrial Board of Appeals to review the Commissioner's decision. Before scheduled hearings could be held, plaintiffs commenced the instant action in the district court asserting claims under state law, and alternatively, under ERISA. The Commissioner intervened demanding that Burlington pay severance benefits in accordance with § 198-c of the New York Labor Law, which makes it a misdemeanor not to pay wages or wage supplements due employees. N.Y. Lab. Law § 198-c (McKinney Supp. 1984-1985).

In its well-considered opinion, the district court held that Burlington's severance pay policy was an ERISA plan, under either 29 U.S.C. § 1002(1)(A) or § 1002(1)(B). It found that an ERISA plan did not need to have assets separate from the general assets of the employer,

that a severance pay plan did not need to be established as a Taft-Hartley trust under § 1002(1)(B) and that, in any event, severance pay was the same as unemployment benefits and a severance policy was consequently a "welfare plan" under § 1002(1)(A). The district court found as a matter of law that severance pay constitutes an unemployment benefit because it requires an "instantaneous unemployment between engagements." The factual issue of whether longer unemployment was a prerequisite under the terms of Burlington's policy was not decided. The district court further held that ERISA preempted the state law causes of action. It therefore permanently enjoined the proceedings before the State Industrial Board and enforcement of its Orders to Comply with the Commissioner's decision pursuant to § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). Judge Brieant denied the Commissioner's application to stay the federal action and, on his own motion, certified his decision on preemption for immediate review by this Court pursuant to Fed. R. Civ. P. 54(b). Plaintiffs and the State of New York were joined on the appeal by ten states and the District of Columbia that filed briefs as amici curiae.

This appeal presents three principal questions: first, whether the district court was correct in holding that an unfunded severance pay policy is an ERISA plan under either § 1002(1)(A) or § 1002(1)(B); second, if Burlington's severance policy is an ERISA plan, whether the plaintiffs' state law claims and § 198-c (insofar as it applies to severance plans) are preempted; finally, whether Burlington should be estopped from raising a defense of preemption because it allegedly never sought to comply with ERISA's protective reporting and disclosure requirements.

II

Does An Unfunded Severance Pay Policy Constitute A Welfare Benefit Plan Within The Meaning of ERISA?

The first issue is whether Burlington's severance pay policy constitutes an employee welfare benefit plan under § 3 of ERISA. 29 U.S.C. § 1002(1). Amici and appellants argue that a promise or agreement to pay severance benefits, without more, does not constitute a welfare benefit plan within the meaning of ERISA. If the severance pay plan is not one governed by ERISA then, of course, the common law and statutory claims are not preempted. Section 3(1) of ERISA defines an "employee welfare benefit plan" or "welfare plan" to include:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title [§ 302(c) of the Labor-Management Relations Act] (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1). Section 1002(1)(A) enumerates a number of benefits, including unemployment benefits, but

severance benefits is not included among them. Section 1002(1)(B) includes within the definition of a welfare plan "any benefit" described in 29 U.S.C. § 186(c), but § 186(c) refers only to *pooled* severance benefits.

Although severance pay is often a reward for past service, it also serves the same purpose as unemployment benefits. When ties that bind an employee to his or her company are severed by the employer, unemployment for the employee—whether fleeting or permanent—is an inexorable consequence. Thus, in our view severance pay is an unemployment benefit and an unfunded severance pay policy constitutes an "employee welfare benefit plan" under § 1002(1)(A). *See Jung* v. *FMC Corp.*, 755 F.2d 708, 710 n.2 (9th Cir. 1985); *Petrella* v. *NL Industries*, 529 F. Supp. 1357, 1361 (D.N.J. 1982). *See also Sly* v. *P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983).

We also conclude that an unfunded severance pay policy is an "employee welfare benefit plan" under § 1002(1)(B). *See, e.g., Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985); *Dhayer* v. *Weirton Steel Division of National Steel Corp.*, 571 F. Supp. 316, 329-330 (N.D. W. Va.), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2387 (1984); *Pinto* v. *Zenith Radio Corp.*, 480 F. Supp. 361, 363 (N.D. Ill. 1979), *aff'd mem.*, 618 F.2d 110 (7th Cir. 1980). *Donnelly* v. *Aetna Life Insurance Co.*, 465 F. Supp. 696, 698 (E.D. Pa. 1979).

We base our view on the reasonableness of a regulation that construes § 1002(1)(B) to include severance pay. The United States Department of Labor regulation interpreting § 1002(1)(B) does not limit its definition of a plan to a severance pay policy that is pooled or funded by a trust fund. *See* 29 C.F.R. § 2510.3-1(a)(3) (1984);

Blau v. *Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1985). The regulation includes unfunded severance pay benefits as within the definition of a "welfare plan," and reads:

> Moreover, only paragraph (6) describes benefits not described in section 3(1)(A) [29 U.S.C. § 1002(1)(A)] of the Act. The benefits described in section 302(c)(6) of the LMRA [29 U.S.C. § 186(c)(6)] but not in section 3(1)(A) of the Act are "*** holiday, severance or similar benefits". *Thus, the effect of section 3(1)(B) of the Act is to include within the definition of "welfare plan" those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized).*

29 C.F.R. § 2510.3-1(a)(3) (1984) (emphasis added).

Amici correctly note that the regulation bases its conclusion on paragraph (6) of § 186(c), 29 U.S.C. § 186(c)(6), which allows payments by an employer to a "trust fund" established for the purpose of "*pooled* vacation, holiday, severance or similar benefits." *Id.* (emphasis added). From this they argue that the regulation is inconsistent with that language. They urge that as severance benefits were not enumerated in subparagraph (A) of § 1002(1), but were incorporated only in subparagraph (B), then unless severance payments are made out of a *fund* described in § 186(c), a severance pay policy is not an ERISA plan.

We recognize the well-established rule that "[a]lthough an agency's interpretation of the statute under which it operates is entitled to some deference, 'this deference is constrained by our obligation to honor the clear

meaning of a statute, as revealed by its language, purpose, and history." *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979) (citation omitted). In plaintiffs' view none of the decisional law that finds unfunded severance pay practices to be plans—when those courts summarily accept jurisdiction under ERISA for such claims—has adequately analyzed either the legislative history or the full language of the LMRA provisions relating to trusts. We find that a review of the legislative history supports the reasonableness of the Department of Labor's construction of § 1002(1)(B).

The Report of the Senate Committee on Labor and Public Welfare indicates that subsection (B) had its genesis in "[a]n amendment offered by Senator Javits extending coverage of the fiduciary and disclosure amendments to the [Welfare and Pension Plans Disclosure Act] to all benefit arrangements *described in or permitted by*" § 186. S. Rep. No. 127, 93rd Cong., 2d Sess. 3 (1973), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4851 (emphasis added). Burlington argues that "described in or permitted by" indicates an intent to include plans funded other than through a Taft-Hartley trust, since such plans would not be "permitted by" but would be "described in" § 186. Use of the phrase "described in"—the only phrase ultimately chosen by Congress to use in the Act—arguably expresses a purpose to encompass all *types* of benefits that are enumerated in § 186(c), even those benefits not permitted under the section because they are not funded through a trust. In consequence, we conclude that the U.S. Department of Labor's interpretation that an unfunded severance pay policy is an "employee welfare benefit plan" under § 1002(1)(B) is a reasonable construction of the statute and entitled to judicial deference.

Amici and plaintiffs assert that Burlington's unfunded severance pay policy is, instead of an ERISA plan, merely a "payroll practice" under Department of Labor regulations. They argue that severance pay is included under a regulation that lists payments of compensation out of an employer's general assets during periods of absence due to sickness, vacation, holiday, and other reasons. *See* 29 C.F.R. §§ 2510.3-1(b)(3) (1984). Although this provision is specific and does not include severance pay benefits, we recognize that it was not meant to be exhaustive. *See id.* § 2510.3-1(a)(4). But, as we have concluded for other reasons that an unfunded severance pay policy is included within the definition of "welfare plan," we decline to read unfunded severance pay benefits into the catch-all provision of the regulation defining payroll practices. Perhaps severance pay is distinguished from other designated payroll practices because those set forth in the regulations occur during the course of employment, while severance pay occurs only after termination. *See Scott*, 754 F.2d at 1503. Moreover, an employer faced with the loss of many employees may owe a large amount in severance pay, increasing the risk that it might default on its severance pay obligations because of a lack of funds. This financial loss to employees is a primary concern of ERISA. *Id.*

III

Are Plaintiffs' Statutory and Common Law Claims Preempted Because They "Relate To" the Plan?

We turn to consider whether ERISA preempts plaintiffs' statutory and common law claims. The Act was aimed to occupy fully the field of employee benefit plans

and to establish it "as exclusively a federal concern." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). Section 514(a) of ERISA states that it "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan [within its coverage]." 29 U.S.C. § 1144(a) (emphasis added). Congress defined the term "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. § 1144(c)(2). Although there has been uncertainty as to when a state law "relates to" a plan, the Supreme Court's opinion in *Shaw* v. *Delta Air Lines*, 463 U.S. 85 (1983), established that "relates to" must be construed in its "normal sense"—that is, a state law claim is preempted "if it has a connection with or reference to such a plan." *Id.* at 97 (footnote omitted). *Shaw* rejected the view that common law causes of action or state regulatory statutes are preempted only when they attempt to regulate an area expressly covered by ERISA, such as reporting, disclosure and fiduciary responsibility. *Id.* at 98.

Relying on *Rebaldo* v. *Cuomo*, 749 F.2d 133 (2d Cir. 1984), plaintiffs assert that the claims here do not "relate to" the plan. In that case, we held that a purely local transaction was at issue and the state law affected the plans in " 'too tenuous, remote or peripheral a manner to warrant a finding that the law "relates to" the plan.' " *Id.* at 138 (quoting *Shaw*, 463 U.S. at 100 n.21). The law at issue in *Rebaldo* indirectly increased the cost of doing business. We explained that when "a State statute of general application does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some

economic impact on the plan does not require that the statute be invalidated." *Id.* at 139 (footnote omitted); *see also American Progressive Life & Health Insurance Co.* v. *Corcoran*, 715 F.2d 784, 787 (2d Cir. 1983) (commission scales adopted by state regulation might indirectly affect levels of benefits provided by insurer, but such was so peripheral to ERISA as not to be preempted by it). In this case, on the other hand, the state law claims seeking to enforce the severance pay policy would determine whether any benefits are paid, and directly affect the administration of benefits under the plan. As noted, the plaintiffs here were employed in 16 different states. The policy favoring national uniformity in this field, therefore, strongly supports preemption.

Plaintiffs, joined by amici, also urge that absent a clear expression from Congress, ERISA cannot be deemed to preempt state wage collection statutes because such legislation is a fundamental exercise of the states' police power. *See Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). They argue that wage collection statutes are no less important an exercise of traditional police powers than those state domestic relations laws found not to be preempted in *American Telephone & Telegraph Co.* v. *Merry*, 592 F.2d 118 (2d Cir. 1979). There, we held that ERISA does not preempt state domestic relations laws that affect distribution of pension benefits. *Id.* at 121. But in *Stone & Webster Engineering Corp.* v. *Ilsley*, 690 F.2d 323 (2d Cir. 1982), *aff'd sub nom. Arcudi* v. *Stone & Webster Engineering Corp.*, 103 S. Ct. 3564 (1983), we made clear that to avoid preemption it is not sufficient that the state statute represent the exercise of a traditional police power. 690 F.2d at 330. In order to avoid being preempted, a state law in addition to being an exercise of traditional police powers must also affect the plan

"in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21; *Authier* v. *Ginsberg*, 757 F.2d 796, 800 n.6 (6th Cir. 1985). Although the regulation of the employment relationship under New York Labor Law § 198-c is an exercise by the State of its traditional police powers, the state statute does not have such a remote and tenuous connection to Burlington's severance pay plan so as to allow us to conclude that it does not "relate to" it.

Amici finally urge that claims by employees to enforce the direct liability of employers for promised wages and benefits coexist with any rights plan beneficiaries may have to sue employee benefit plans under ERISA. They argue that the Supreme Court in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980), and circuit courts since *Nachman*, have distinguished between direct contractual liability that an employer has to its employees, and statutory liability under ERISA. The short answer to this argument is that *Nachman* and its progeny were based on federal rather than state law. As the plaintiffs are asserting state law claims, the district court properly found plaintiffs' claims preempted.

Other courts have found state law causes of action preempted when they were based on claims for relief under the common law of contracts, *see, e.g.*, *Lafferty* v. *Solar Turbines Int'l*, 666 F.2d 408, 409 (9th Cir. 1982); *Ogden* v. *Michigan Bell Telephone Co.*, 571 F. Supp. 520, 524 (E.D. Mich. 1983); *Tolson* v. *Retirement Committee of the Briggs & Stratton Retirement Plan*, 566 F. Supp. 1503, 1503-04 (E.D. Wisc. 1983); *Shaw* v. *Intn'l Ass'n of Machinists*, 563 F. Supp. 653, 658-59 (C. D. Cal. 1983); or state regulatory statutes, including § 198-c, *see, e.g.*, *Trustees of Sheet Metal Workers' Int'l Ass'n Production*

Workers' Welfare Fund v. *Aberdeen Blower and Sheet Metal Workers*, 559 F. Supp. 561, 562 (E.D.N.Y. 1983); *Calhoon* v. *Bonnabel*, 560 F. Supp. 101, 107-10 (S.D.N.Y. 1982); *California Hospital Ass'n* v. *Henning*, 569 F. Supp. 1544, 1547 (C.D. Cal. 1983). To hold otherwise would undermine the uniformity in plan administration that the Act was designed to promote.

IV

Should Burlington Be Estopped From Raising The Defense Of Preemption?

We turn finally to consider whether, even though a plan is established subject to ERISA's coverage section, Burlington should be estopped from raising the defense of preemption because it failed to comply with the Act's applicable reporting, disclosure and fiduciary requirements. ERISA is designed to provide employees with information about their rights under the plan so that they may police its administration. *See* H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4649. Plaintiffs argue that since Burlington benefited from its failure to comply with these statutory requirements, it should be estopped from relying on the Act to avoid its contractual and state law obligations.

Burlington responds that it would be incongruous for an employer maintaining an informal plan to be able to circumvent the Act by failing to comply with its requirements. *See Donovan* v. *Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982). Courts that have accepted plaintiffs' argument have done so in the context in which an employer sought to avoid liability under ERISA. *See, e.g.*,

id. A different situation is presented here—the employer does not seek to avoid the strictures of ERISA by means of previous noncompliance, but rather raises preemption as a legal defense to state law obligations otherwise applicable to it. A serious risk of unfairness may exist when an employer that has never sought to comply with ERISA wants to use the Act's broad preemption provision to avoid potential liability to its employees under state law.

In *Blau*, 748 F.2d 1348, this dilemma was appropriately resolved. There it was held that the state law claims were preempted, even though the employer had totally failed to comply with ERISA. *Id.* at 1356. But rather than simply reviewing the employer's denial of severance pay to see if it was a reasonable construction of the terms of the policy, *see Slack* v. *Burlington Industries*, No. C-83-274-G (M.D.N.C. Oct. 17, 1984), *appeal docketed*, Nos. 84-2241(L), 84-2257 (4th Cir. Nov. 11, 1984), the court reviewed that denial in the context of the employer's failure to comply with ERISA's requirements. Recognizing that ordinarily there is no remedy for the violation for procedural requirements, the court held that in some circumstances noncompliance with procedural requirements will "work a substantive harm." *Blau*, 748 F.2d at 1354. It concluded that the employer had been arbitrary and capricious in adding a term to its severance pay policy. *Id.; see also McLaughlin* v. *Connecticut General Life Insurance Co.*, 565 F. Supp. 434, 447 n.9 (N.D. Cal. 1983) ("in order to enforce ERISA's fiduciary standards for claims denials, it may be appropriate . . . to apply [strict rules of construction] when the ERISA fiduciary making the denial [has] a financial interest in the decision").

We adopt that approach because it adequately protects the rights of employees with respect to the severance pay benefits, and best effectuates Congress's aim to promote the uniform administration of employee benefits. It both eliminates any incentive on the part of employers not to comply with the Act's reporting, disclosure and fiduciary requirements, and avoids inconsistent treatment of claims under state law. Thus, it is unnecessary and undesirable to hold Burlington estopped from raising the defense of preemption. The question of whether Burlington's violations of ERISA's requirements sufficiently taint its denial of severance pay so as to warrant a finding that it was arbitrary and capricious is not before us. That determination is left to the judgment of the district court. *Compare Blau*, 748 F.2d 1348 (violations sufficient under facts of case to warrant finding that denial was arbitrary) *with Jung*, 755 F.2d 708 (no violations sufficient under facts of case to warrant finding that denial was arbitrary).

V

Remaining Contentions

There is no merit to plaintiffs' remaining contentions. When Congress under ERISA has preempted the entire field of employee benefit plans, an argumnt for federal abstention founded upon substantial disruption to state policies extending beyond the present controversy is not properly made under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

Nor is there merit to the contention that the district court improperly enjoined the state administrative proceeding. Since there is a plan, Burlington is a fiduciary

with respect to that plan, *see Jung*, 755 F.2d at 710, and is authorized under the statute to seek an injunction of the state proceedings. *See* 29 U.S.C. § 1132(a)(3). Granting the injunction did not violate the Anti-Injunction Act, 28 U.S.C. § 2283, even assuming that the Anti-Injunction Act applies to administrative proceedings of the Industrial Board of Appeals, *see Town of Springfield* v. *McCarren*, 549 F. Supp. 1134, 1151 (D. Vt. 1982), *aff'd mem.*, 722 F.2d 728 (2d Cir. 1983), because the injunction falls within the Act's exception for actions "expressly authorized" by federal law.

CONCLUSION

Accordingly, the judgment appealed from is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IRVING GILBERT, et al.,

Plaintiff,

—and—

83 Civ. 6954
(CLB)

LILLIAN ROBERTS, as Commissioner of Labor of the State of New York,

Plaintiff-Intervenor,

—against—

BURLINGTON INDUSTRIES, INC.,

Defendant.

----------X

MEMORANDUM AND ORDER

Brieant, J.

In this action thirty-six former employees of the Sock and Hosiery Division of Burlington Industries, Inc. ("Burlington"), a major conglomerate, sue upon claims founded on the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and fraud claims as well as claims arising under statutes of New York and North Carolina said to be applicable, which relate to vacation and payroll severance benefits said to be due pursuant to a 1974 Burlington policy concerning severance pay.

In January 1982, Burlington sold to Kayser-Roth Hosiery, Inc. ("Kayser-Roth"), a large manufacturer, not a party to this litigation, all of its assets, trademarks, customer lists and goodwill used in and about its Sock and Hosiery Divisions. Under the sale agreement, Kayser-Roth agreed with Burlington "to use its best efforts to encourage all salaried and wage employees of the Operations, including all sales personnel to transfer to the employ of [Kayser-Roth]." (Plaintiff-Intervenor's Motion for Stay, filed March 12, 1984, Ex. H). The understanding between Burlington and Kayser-Roth that substantially all of the employees of the acquired Divisions would be retained is also set forth expressly in a supplemental agreement, dated December 18, 1981, which provides that, "[a]t the closing, [Kayser-Roth] will retain all employees, wage and salaried, of the Divisions . . .," except for five employees specifically referred to in the agreement. (Plaintiff-Intervenor's Motion for a Stay, Ex. G). Those five Burlington employees, not parties to this action, received severance benefits from Burlington.

After the sale, all of the plaintiffs, except one who retired, were employed by Kayser-Roth in the positions and at the salaries or rates of pay received previously from Burlington. However, plaintiffs here seek to enforce their rights to severance pay to the same effect as if Burlington had simply gone out of business with respect to its Sock and Hosiery Divisions, leaving them unemployed.

The Burlington policy regarding severance benefits, as set forth in the company Policy Manual as it existed at the time of sale of the Divisions to Kayser-Roth, provided in relevant part as follows:

> "Section: Compensation – Salaried Employees
> Sub-Sec: Terminations – Payroll Severance – Vacation Severance

I. *Company Policy*

A. *General* – The Company makes payroll severance payments and vacation severance payments to eligible salaried employees who are terminated from the Company.

B. *Payments* – Payroll severance payments are based upon tables contained in this policy. Vacation severance payments are based upon a person's length of continuous service with the Company less vacation taken or adjusted as defined by this policy.

II. *Application of Policy*

A. *Payroll Severance* – All regular full-time salaried employees who meet eligibility requirements are paid payroll severance based upon continuous service as shown in Exhibit A or Exhibit B.

1. *Eligibility* – Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are involuntarily terminated from the Company. Eligibility requirements are:

a. *Job Elimination* – This category consists of terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes.

b. *Other Involuntary Terminations* – These are terminations due to unsatisfactory job performance which is not willful.

2. *Ineligibility* – Employees are not eligible to receive payroll severance if:

a. *Temporary Full-Time, Temporary Part-Time, or Regular Part-Time Employees* – Employees assigned to these employment classifications are not eligible for payroll severance payments.

b. *Ineligible Full-Time Employees* – Employees who are terminated because of early retirement, mandatory retirement, death, misbehavior, lack of cooperation, willful negligence, or other unfriendly acts against the Company or towards its management are not eligible for payroll severance payments."

(Affidavit of Calvin A. Michaels, sworn to November 29, 1983, Exhibit A, at 1-2).

Defendant contends that this written policy applies only to employees who are involuntarily terminated *and* whose jobs are eliminated, leaving them unemployed, and that the use of the phrase "job elimination" evidences the intent to require the actual loss of a job as opposed to a mere termination from the Burlington payroll under circumstances which preserve the employee's job under new ownership and management of the same production assets. Plaintiffs argue that the plain, unambiguous language of the policy statement entitles them to severance pay.

Following the sale of the Divisions by Burlington, ten of the plaintiffs in this action filed claims with the New York State Department of Labor, pursuant to § 198-c of the New York Labor Law. Burlington applied to the New York State Commissioner of Labor ("the Commissioner") to dismiss these claims, asserting that § 198-c is preempted by ERISA, and therefore the New York State Labor Department lacks jurisdiction to adjudicate the claims. On September 2, 1983, the Commissioner

issued an Order to Comply with respect to plaintiff's claims. On September 8, 1983, Burlington appealed the Commissioner's decision to the Industrial Board of Appeals ("the Board"), again raising the preemption and jurisdictional issues, and was granted a stay of enforcement of the Order to Comply.

Prior to the issuance of the stay and on September 22, 1983, plaintiffs initiated this action alleging claims under ERISA and in the alternative under state law "because the case is governed either by state statutory and common law or by . . . ERISA, but most probably not by both." (Complaint at ¶ 1). After the Board was informed of commencement of this action, it adjourned all further proceeding, but now indicates an intention to resume its adjudicatory process.

On December 12, 1983, Burlington moved to dismiss the plaintiffs' claims in this case, or, in the alternative, to grant it summary judgment.

On January 5, 1984, the Commissioner was granted leave to intervene in this action, and on February 3, 1984, Burlington counterclaimed against the Commissioner, alleging that:

> "The New York State Department of Labor violated and continues to violate Section 114(a) (sic) of ERISA in (i) acting under Section 198-c of the New York Labor Law with respect to claims involving Burlington's severance benefit plan, (ii) assuming jurisdiction over such claims, (iii) issuing the Order to Comply, and (iv) failing to dismiss or discontinue all of the above described proceedings before it."

On March 16, 1984, the Commissioner moved to stay this federal action during the pendency of the state administrative proceedings. Thereafter, on April 13, 1984, Burlington requested that the Board adjourn its hearings since Burlington's motion was *sub judice*, and on April 20, 1984, the Board informed the parties that it intended to await this Court's determination of Burlington's motion before deciding whether to commence its own hearings.

In May, 1984, twenty-six additional claims for unpaid severance benefits were filed with the New York State Labor Department by former Burlington employees. All of these claimants are also plaintiffs in the instant action. Burlington responded as it had with respect to the earlier claims that they were preempted by ERISA.

Section 1144(a) of ERISA provides in pertinent part, that ERISA: "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan."

The central question raised by all of the pending motions is whether ERISA preempts plaintiffs' state statutory and common law claims.

As a threshold matter, this Court must determine whether Burlington's severance pay policy is an "employee benefit plan" within the coverage of ERISA. An "employee benefit plan" is defined as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C. § 1002(3). The Burlington severance pay policy is clearly not an employee *pension* benefit plan, and therefore, it falls within the purview of ERISA only if it is an "employee welfare benefit plan." That term is defined to include:

> "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits in the event of sickness, accident, disability, death or unemployment or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other

> than pensions on retirement or death, and insurance to provide such pensions)."
> 29 U.S.C. § 1002(1).

Defendant contends that since § 1002(1) includes "programs" which provide "unemployment" benefits, and since severance pay is among the most common forms of unemployment benefits, it is clear that Congress intended to include severance pay plans as a form of employee benefit plan under ERISA. Burlington argues further that since the Act incorporates all of the types of benefits described in § 186(c) within the scope of the term "employee benefit plan," and since severance payments are specifically referred to in 29 U.S.C. § 186(c)(6), severance benefit plans are covered as employee benefit plans within the plain meaning of ERISA. Finally, defendant asserts that all federal courts heretofore addressing claims pursuant to severance pay plans have held that such benefits are covered by ERISA. *See, e.g. Dhayer v. Weirton Steel Division of National Steel Corp.*, 571 F.Supp. 316, 320-30 (N.D.W.Va. 1983); *Petrella v. NL Industries, Inc.*, 529 F.Supp. 1357 (D.N.J. 1982); *Dependahl v. Falstaff Brewing Co.*, 491 F.Supp. 1188, 1196 (E.D.Mo. 1980), *aff'd*, 653 F.2d 1208 (8th Cir.), *cert. denied sub nom. Dependahl v. Kalmanovitz*, 454 U.S. 1084 (1981); *Calhoun v. Falstaff Brewing Co.*, 478 F.Supp. 357, 359 (E.D. Mo. 1979); *Donnelly v. Aetna Life Insurance Co.*, 465 F.Supp. 696, 698 (E.D. Pa. 1979); *Pinto v. Zenith Radio Corp.*, 480 F.Supp. 361, 362-63 (N.D. Ill. 1979), *aff'd*, 618 F.2d 110 (7th Cir. 1980).

Plaintiffs argue that ERISA does not apply to Burlington's severance pay policy, and that therefore their state law claims need not be dismissed, because there is no *plan* as such, but simply a naked promise to pay severance benefits which is enforceable under state law. In support of their position, plaintiffs contend that every "employee welfare benefit plan" must have an identity and structure of its own, evidenced by a written instrument naming a fiduciary, providing for a funding policy, allocating responsibilities among those who will administer the plan, establishing procedures for the plan, identifying persons with

authority to amend the plan, and specifying the basis on which payments will be made to and from the plan. [Plaintiffs' Memorandum of Law, filed March 26, 1984, at 50, citing 29 U.S.C. §§ 1102(a) and (b)]. Plaintiffs also assert that a plan must either have identifiable asserts (sic) of its own, independent from the general assets of the employer, or commit itself to establishing a funding policy that will assure that an adequate proportion of the employer's income will be dedicated to the plan. Finally, plaintiffs contend that to qualify as a severance pay employee benefit plan within the meaning of the Act, the plan must have been established as a Taft-Hartley Trust pursuant to § 302(c) of the Labor Management Relations Act, 29 U.S.C. § 186(c). Plaintiffs assert that Burlington's severance pay policy fails to satisfy any of these basic criteria.

This Court concludes, however, that the Burlington severance pay policy is an "employee welfare benefit plan" for the purposes of ERISA, and within the plain meaning of that statute. The existence of a "plan" under ERISA is to be determined solely by an examination of the Act's "coverage" and "definitional" sections. *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982) (*en banc*); *Dependahl v. Falstaff Brewing Corp.*, *supra*. In construing the language used in a remedial Congressional enactment, in the absence of absurdity, legislative history to the contrary, or some other compelling reason, a Court should conclude that the words used by Congress were meant to have their plain, normal and commonly accepted meaning. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

It is clear that the plain language of § 1002(1) encompasses severance pay plans such as the one set forth in Burlington's policy manual: it is a plan, established by an employer, for the purpose of providing an unemployment benefit to its participants, the Burlington employees, through the use of general corporate assets. See 29 U.S.C. § 1002(1)(A), and/or a benefit described, i.e., enumerated, in § 186(c) of Title 29.

Employee welfare benefit plans need not be funded in order to be within ERISA. See 29 U.S.C. §§ 1081 and 1082.

Furthermore, plaintiffs misconstrue the import of the Act's fiduciary and reporting provisions: these provisions state the responsibilities of fiduciaries and administrators of plans covered by ERISA, but they do *not* set forth prerequisites for ERISA coverage. As the Court noted in *Donovan, supra*:

> "because the policy of ERISA is to safeguard the well-being and security of working men and women and to apprise them of their rights and obligations under any employee benefit plan, ... it would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans ... to circumvent the Act merely because an administrator ... failed to satisfy reporting or fiduciary standards." 688 F.2d at 1372.

Similarly, it would be incongruous to permit plaintiffs to undermine the express purpose of ERISA, the establishment of a uniform system under which employee benefits are defined and administered, by reason of defendant's alleged failure to comply fully with reporting requirements concerning a plan which met the Act's basic criteria.

Moreover, the Court rejects plaintiffs' contention that an employee welfare benefit plan must have been established as a Taft-Hartley trust. The language of the Act simply refers to the types of benefits "described" in § 186(c), but does not require that such benefit plans meet all the criteria of Taft-Hartley trusts. See S.Rep. No. 127, 93rd Cong., 2d Sess. 3 *reprinted in* 1974 U.S. Code Cong. & Adm. News 4851 (genesis of subsection 1002(1)(B) is "[a]n amendment offered by Senator Javits extending coverage ... to all benefit arrangements *described in or permitted by* Section 302 of the Taft-Hartley Act") (emphasis added).

Finally, the regulations promulgated pursuant to ERISA contradict plaintiffs' assertion that in order to come with the Act, a severance pay arrangement must be funded by assets separate from the employer's general funds and that severance benefits

to be paid from an employer's general assets are excluded from ERISA coverage. In an interpretive bulletin explaining fiduciary responsibilities under the Act, the Department of Labor stated in question and answer form:

> "Q: Must a welfare plan in which the benefits are paid out of the general assets of the employer have a procedure for establishing and carrying out a funding policy set forth in the plan instrument?
>
> A: No. Section 402(b)(1) requires that the plan provide for such a procedure 'consistent with the objectives of the plan' and requirements of Title I of the Act. In situations in which a plan is unfunded and Title I of the Act does not require the plan to be funded, there is no need to provide for such a procedure. If the welfare plan were funded, a procedure consistent with the objectives of the plan would have to be established." 29 C.F.R. § 2509.75-5.

Similarly, in a statement accompanying a proposed amendment to ERISA regulations, the Department of Labor stated that:

> "since the provision of severance pay is one of the recognized purposes for a welfare plan under section 3(1), it would seem that severance pay plans would in virtually all cases be welfare plans, whether or not they are also pension plans for the purposes of Title I of ERISA." 44 Fed. Reg. 11763 (1979).

Having determined that Burlington's severance pay policy is an "employee benefit plan" covered by ERISA, the Court will now address whether § 1144(a) preempts plaintiffs' state law claims.

Section 1144(a) of the Act states that ERISA supersedes any and all State laws "insofar as they *relate to* any employee benefit plan described in section 1003(a)" of the Act (emphasis added). This language has been construed broadly by the Supreme

Court to preempt state laws which "have a connection with or reference to" an employee benefit plan. *Shaw v. Delta Airlines, Inc.*, ____ U.S. ____, 103 S.Ct. 2890 (1983).

Both § 198-c of the New York Labor Law and § 75-1.1 of the General Statutes of North Carolina, upon which plaintiffs rely in seeking severance payments "relate to" the Burlington severance pay plan. It follows that Congress has, by ERISA, preempted these state laws.

Accordingly, defendant is entitled to a final injunction and stay of enforcement of the Order to Comply, and of the pending proceedings before the New York State Industrial Board of Appeals and the New York State Commissioner of Labor on the ground of federal preemption. The Commissioner's motion to stay this action is denied. Defendant is also entitled to a final judgment dismissing all state law, non-ERISA claims, pleaded in this action. *See, e.g., Dependahl v. Falstaff Brewing Corp.*, 491 F.Supp. 1188 (E.D.Mo. 1980), *aff'd*, 653 F.2d 1208 (8th Cir.), *cert. denied sub nom. Dependahl v. Kalmanovitz*, 454 U.S. 1084 (1981); *Ogden v. Michigan Bell Telephone Co.*, 571 F.Supp. 520, 523-24 (E.D. Mich. 1983); *Shaw v. Int'l Ass'n Machinists & Aerospace Workers Pension Plan*, 563 F.Supp. 653, 658-59 (C.D. Cal. 1983).

As a matter of discretion, the Court denies so much of defendants' motion which seeks dismissal or summary judgment with respect to the ERISA claims, with leave to renew when pretrial discovery is complete.

There is no just cause for delay. Rule 54(b), F.R.Civ.P. A judgment shall enter dismissing the state claims and granting injunctive relief as set forth above. Counsel for the remaining parties shall confer and agree upon a scheduling order with respect to the ERISA claims. A status report conference will be held before the Court on November 27, 1984 at 9:30 A.M., or at an earlier date if counsel for either party so requests.

Settle a Rule 54(b) Judgment on five (5) days notice.

So Ordered.

Dated: New York, New York
September 17, 1984

Charles L. Brieant
U.S.D.J.

Endorsement

IRVING GILBERT, et al., Plaintiff and LILLIAN ROBERTS, etc., Plaintiff-Intervenor v. BURLINGTON INDUSTRIES, INC., Defendant. 83 Civ. 6954-CLB

Reargument has been had, and on reargument this Court adheres to its prior decision. However, in the interests of Justice and to allay any misapprehension (unfounded) on the part of counsel, the Court amplifies its prior opinion to include the following:

> Nothing herein contained shall preclude the parties from submitting proof at trial as to whether or not Burlington's severance pay policy, on its face or as administered, requires unemployment of greater duration than "instantaneous" unemployment between engagements, as a condition for eligibility for benefits. However, it is the present conclusion of this Court that at the very least the severance pay policy, and indeed any such plan, contemplates unemployment for at least an instant of time at severance, and before the severed employee becomes re-employed by a new employer. Accordingly, during that instant of time, any severed employee is "unemployed" in contemplation of law. Such a severance plan may appropriately be regarded as a plan which as a matter of law and in the absence of evidence to the contrary, provides "unemployment benefits" within 29 U.S.C. § 1002(1)(A)."

A judgment has been signed.

So Ordered.

Dated: New York, New York
October 30, 1984

Charles L. Brieant
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IRVING GILBERT, et al.,

Plaintiffs,

—and—

83 Civ. 6954
(CLB)

LILLIAN ROBERTS, as Commissioner of Labor of the State of New York,

Plaintiff-Intervenor,

—against—

BURLINGTON INDUSTRIES, INC.,

Defendant.

----------X

JUDGMENT

The defendant, Burlington Industries, Inc. ("Burlington"), having moved on December 12, 1983 for summary judgment dismissing all of plaintiffs' claims; the plaintiff-intervenor, the Commissioner of Labor of the State of New York (the "Commissioner"), having moved on March 16, 1984 to stay this action during the pendency of state administrative proceedings on March 16, 1984; and Burlington having moved on July 11, 1984 for an Order permanently enjoining the Commissioner from enforcing Orders to Comply issued by the Commissioner pursuant to New York Labor Law Section 198-c on September 2, 1983 and June 22, 1984; and the aforesaid motions having come on to be heard on March 28,

1984 and July 20, 1984; and the Court having issued a Memorandum and Order on September 17, 1984, granting Burlington partial summary judgment, pursuant to Rule 54(b), with leave to renew as to the remainder of its motion, denying the Commissioner's motion for a stay, and granting Burlington's motion for a permanent injunction; and the Court having modified its memorandum and order by endorsement dated October 30, 1984 filed herein;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that (a) the claims stated in the "FIRST" through the "SEVENTH" causes of action of the plaintiffs' Amended Complaint, inclusive, are dismissed; (b) the Commissioner's complaint is dismissed; (c) the Commissioner, her agents, employees, and attorneys, and all divisions, bodies and organs of the New York State Department of Labor, are permanently enjoined from proceeding against Burlington with respect to the claims made by its former employees regarding the denial of severence benefits as reflected in Orders to Comply issued by the Commissioner on September 2, 1983 and June 22, 1984; (d) enforcement of said orders to comply is permanently stayed; and (e) the Court, expressly determining, under Rule 54(b), Fed. R. Civ. P., that there is no just reason for delay in entering final judgment dismissing the "FIRST" through the "SEVENTH" causes of action of the plaintiffs' Amended Complaint, and dismissing the Commissioner's Complaint in its entirety, hereby directs that final judgment dismissing the "FIRST" through the "SEVENTH" causes of action of the plaintiffs' Amended Complaint, and dismissing the Commissioner's Complaint in its entirety, be entered, and the same hereby is entered.

Dated: New York, New York
October 30, 1984

Charles L. Brieant
United States District Judge

United States Court of Appeals

for the

Second Circuit

Nos. 84-7824
84-7908

IRVING GILBERT, IRENE PRINCE, DAVID J. FRANK, HERBERT P. KAPLAN, BERNARD B. LARGMAN, DORA NICOLINI, HERBERT PEPPEL, BERTHA RICHIE, DAVID SCHOENECK, RAQUEL R. SILENSKY, MARIE SILVESTRI, BRENDA TILLMAN HUMPHREYS, B. GAITHER SHAW, JR., ROBERT S. AHRENS, BENJAMIN F. BLYE, JR., DAVID H. BRUNT, JACK R. CARPENTER, KENNETH E. ECKARD, RONALD F. GAUTHIER, LOUIS GORELICK, JEREMY HARRIS, RONALD H. HICKS, ROBERT D. HUDDLESTON, THOMAS R. JEROME, GASTON D. LOPEZ, MICHAEL LOSCHENKO, PHILLIP R. MULLINS, DOROTHY NOVAK, ANTHONY J. PETRONIS, BERNARD PORVIN, CHARLES A. POWERS, SAUL ROTH, JAMES A. SBARBORO, JOHN SELLS, JAMES M. STUTTS, and GORDON L. VAN DUSEN,

Plaintiffs-Appellants

LILLIAN ROBERTS,
as Commissioner of Labor of the State of New York,

Plaintiff-Intervenor-Appellant,

– against –

BURLINGTON INDUSTRIES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given pursuant to Rule 10 of the Rules of the Supreme Court of the United States that Lillian Roberts, Commissioner of Labor of the State of New York, as plaintiff-intervenor-appellant, hereby appeals to the Supreme Court of the United States under 28 U.S.C. § 1254(2) from the judgment of this Court entered on June 17, 1985.

Dated: New York, New York
August 30, 1985

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United States Court of Appeals

for the

Second Circuit

Nos. 84-7824
84-7908
84-7914

IRVING GILBERT, IRENE PRINCE, DAVID J. FRANK, HERBERT P. KAPLAN, BERNARD B. LARGMAN, DORA NICOLINI, HERBERT PEPPEL, BERTHA RICHIE, DAVID SCHOENECK, RAQUEL R. SILENSKY, MARIE SILVESTRI, BRENDA TILLMAN HUMPHREYS, B. GAITHER SHAW, JR., ROBERT S. AHRENS, BENJAMIN F. BLYE, JR., DAVID H. BRUNT, JACK R. CARPENTER, KENNETH E. ECKARD, RONALD F. GAUTHIER, LOUIS GORELICK, JEREMY HARRIS, RONALD H. HICKS, ROBERT D. HUDDLESTON, THOMAS R. JEROME, GASTON D. LOPEZ, MICHAEL LOSCHENKO, PHILLIP R. MULLINS, DOROTHY NOVAK, ANTHONY J. PETRONIS, BERNARD PORVIN, CHARLES A. POWERS, SAUL ROTH, JAMES A. SBARBORO, JOHN SELLS, JAMES M. STUTTS, and GORDON L. VAN DUSEN,

Plaintiffs-Appellants

LILLIAN ROBERTS,
as Commissioner of Labor of the State of New York,

Plaintiff-Intervenor-Appellant,

— against —

BURLINGTON INDUSTRIES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given pursuant to Rule 10 of the Rules of the Supreme Court of the United States that Irving Gilbert and all the others named in the above-captioned action as plaintiffs-appellants, hereby appeal to the Supreme Court of the United States under 28 U.S.C. § 1254(2) from the judgment of this Court entered on June 17, 1985.

Dated: New York, New York
September 5, 1985

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Attorneys for Plaintiffs-Appellants

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Relevant Statutory Provisions

Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, *et seq.*

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickeness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program –

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which –

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(10) The term "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone. The term "United States" when used in the geographic sense means the States and the Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (sections 1331 to 1343 of Title 43).

* * *

(14) The term "party in interest" means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation.

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation.

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may

prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of Title 26 is permitted to make payments under section 1403 of this title shall be treated as a party in interest with respect to such trust.

* * *

(16) (A) The term "administrator" means—

(i) person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

§ 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any any employer engated in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

* * *

§ 1022. Plan Description and Summary Plan Description

(a) (1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024 (b) (1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a) (1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a) (1) (D) of this title.

(b) The plan description and summary plan description shall

contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies availabe under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

* * *

§ 1102. Establishment of Plan

Named Fiduciaries

(a) (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

Requisite Features of Plan

(b) Every employee benefit plan shall –

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter.

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c) (1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

* * *

§ 1132. Civil Enforcement

Persons Empowered to Bring Civil Action

(a) A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *

Status of Employee Benefit Plan as Entity

(d) (1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

§ 1135. Regulations

Subject to subchapter II of this chapter and section 1029 of this title, the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter. Among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records (subject to section 1134(a) and (b) of this title).

* * *

§ 1144. Other laws

Supersedure; Effective Date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under secton 1003(b) of this title. This section shall take effect on January 1, 1975.

* * *

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

United States Department of Labor Regulation, 29 C.F.R. §2510.3-1(b)

(b) *Payroll practices.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include –

(1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as –

(i) Overtime pay,

(ii) Shift premiums,

(iii) Holiday premiums,

(iv) Weekend premiums;

(2) Payment of an employee's normal compensation, out of the employer's general assests, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment); and

(3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, althcugh physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example –

(i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons.

(ii) Payment of compensation to an employee who is absent while on active military duty.

(iii) Payment of compensation while an employee is absent for the purpose of serving as a juror or testifying in official proceedings.

(iv) Payment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training (whether or not subsidized in whole or in part by Federal, State or local government funds), and

(v) Payment of compensation to an employee who is relieved of duties while on sabbatical leave or while pursuing further education.

New York Labor Law § 198-c

Benefits or Wage Supplements

1. In addition to any other penalty or punishment otherwise prescribed by law, any employer who is party to an agreement to pay or provide benefits or wage supplements to employees or to a third party or fund for the benefit of employees and who fails, neglects or refuses to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty days after such payments are required to be made, shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in section one hundred ninety-eight-a of this article. Where such employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions shall each be guilty of a misdemeanor.

2. As used in this section, the term "benefits or wage supplements" includes, but is not limited to, reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay.

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-441
No. 85-460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRVING GILBERT, et al., and
LILLIAN ROBERTS, as Commissioner of Labor
of the State of New York,

Appellants,

— against —

BURLINGTON INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF APPELLEE BURLINGTON INDUSTRIES, INC. TO DISMISS OR AFFIRM

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No. 85-441
No. 85-460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRVING GILBERT, et al., and
LILLIAN ROBERTS, as Commissioner of Labor
of the State of New York,

Appellants,

– against –

BURLINGTON INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF APPELLEE BURLINGTON INDUSTRIES, INC. TO DISMISS OR AFFIRM

The appellee Burlington Industries, Inc. respectfully moves to dismiss the appeal or affirm the judgment of the United States Court of Appeals, pursuant to Rule 16(1)(a), (c) and (d) of the Rules of this Court.

I

NATURE OF THE CASE

These appeals concern the scope of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001 *et seq.*, as amended.*

In January of 1982 Burlington Industries, Inc. ("Burlington") sold its socks and hosiery divisions to Kayser-Roth Corporation as going concerns. (A-22.)** The individual appellants are all former Burlington employees who remained in their jobs after the sale. (*Id.*)*** Each individual appellant continued to perform the same work he or she had done for Burlington and each received at least the same salary. (*Id.*) Nevertheless, the individual appellants alleged before the New York State Department of Labor that they were entitled to severance benefits.

The Commissioner of Labor of the State of New York (the "Commissioner"), also an appellant here, without holding a hearing, issued orders under Section 198-c of the New York Labor Law**** requiring Burlington to pay over $600,000 in severance benefits to the appellants. (A-7; CA-651.)

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* This motion relates to two separate appeals from the same judgment entered by the Second Circuit on June 17, 1985. The individual appellants' appeal has been assigned docket number 85-460; the appeal of Lillian Roberts, Commissioner of Labor of the State of New York, has been assigned docket number 85-441.

** Citations to the Joint Appendix to the appellants' Jurisdictional Statements are designated as "(A-)"; citations to the Joint Appendix before the Second Circuit are designated as "(CA-)".

*** Any former employee whose job was eliminated as a result of the sale was given severance pay pursuant to Burlington's written severance benefit policy.

**** Section 198-c provides that an employer who violates an "agreement" to provide benefits or wage supplements, including severance benefits, commits a misdemeanor. N.Y. Labor Law §198-c.

Pending Burlington's appeal of the Commissioner's decision to a state review board, the individual appellants commenced this action in the District Court for severance benefits under state law and, alternatively, under ERISA because, they alleged, "the case is governed either by state statutory and common law or by ... ERISA, but probably not by both." (A-25.) The Commissioner intervened demanding that Burlington pay severance benefits to the individual appellants in accordance with Section 198-c. (A-7.)

Burlington moved to dismiss all of the state law claims as being preempted by ERISA and for summary judgment on the ERISA claims. Burlington also moved for an injunction prohibiting further proceedings before the New York State Department of Labor and prohibiting the Commissioner from enforcing the orders she had issued under Section 198-c. (A-31.)

Submissions to the District Court demonstrated that Burlington's Policy Manual, available to all employees, defined the company's policy regarding severance benefits.* (CA-107, 198, 205.) The relevant eligibility provisions required both termination from Burlington and "job elimination". (A-5-6.) This language was used to exclude from the policy's coverage employees involved in a plant or division sale who would thereby be terminated from Burlington's payroll, but whose jobs would be preserved under a new employer. (CA-108-09.) Such employees, who would not be faced with unemployment, were not the intended beneficiaries of Burlington's severance benefit policy and the policy was drafted in a manner which would avoid providing them with a benefit windfall. (CA-507, 522-23.) Burlington consistently interpreted its policy to require both termination from Burlington's payroll and elimination of the employee's job. (CA-113, 461.)

Burlington's Office of Personnel Administration administered its severance benefit policy. (CA-103, 205-06.) The Director of Personnel Administration considered himself and his office to be

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* Eligible employees would receive severance payments equivalent to an amount up to twelve months' of their salary, depending upon their age and length of service to Burlington. (A-6.)

a fiduciary with respect to administration of the policy. (CA-247, 254.) Procedures for processing severance benefits were well established.* Severance payments were made to eligible employees out of Burlington's general assets. (CA-401.)

The District Court dismissed the state law claims and issued an injunction prohibiting state proceedings under Section 198-c. The Court held first that:

> the plain language of §1002(1) [of ERISA] encompasses severance pay plans such as the one set forth in Burlington's policy manual: it is a plan, established by an employer, for the purpose of providing an unemployment benefit to its participants, the Burlington employees, through the use of general corporate assets.

(A-28.)

The District Court concluded that since ERISA preempts all state laws which "relate to" any employee benefit plan covered by ERISA, Burlington was entitled to a final judgment dismissing all state law claims, both statutory and common law, and to an injunction and stay of enforcement of the orders issued by the Commissioner.**

The issue of the individual appellants' eligibility for severance benefits, having been reserved for decision by the District Court,

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* Personnel administrators reviewed termination documents to determine whether eligibility criteria were met. (CA-203.) Review of the eligibility decisions of those adminstrators was then undertaken by Burlington's Office of Personnel Administration. (CA-221-22.) Terminated employees who were not deemed eligible for severance benefits were so notified and adverse decisions could be appealed through existing grievance procedures. (CA-229-31, 427, 569-70.) Grievance procedures were outlined at induction and orientation sessions, were posted, and were published in Burlington's employee handbook. (CA-569-70.) Grievances stated in writing were responded to in writing. (CA-571.)

** The District Court denied that portion of Burlington's motion which sought dismissal or summary judgment with respect to the individual appellants' ERISA claims, with leave to renew at the conclusion of any additional discovery on those claims. (A-31.)

was not before the Second Circuit and is not before this Court. The issues addressed by the Court of Appeals concerned the scope and coverage of ERISA and its preemptive effect concerning the appellants' state statutory and the individual appellants' common law claims.* (A-8.)

The Court of Appeals unanimously affirmed the District Court in all respects. It held that Burlington's unfunded severance benefit policy, as administered by the company was an "employee welfare benefit plan" under Section 1002(1) of ERISA which defines that term. (A-10.) In so holding, the Second Circuit noted not only the reasonableness of United States Department of Labor regulations which address this issue and expressly include severance benefit arrangements within the scope of Section 1002(1), but also the numerous, uniformly congruent decisions of other federal courts. (A-10-11.)

Since Burlington's severance benefit policy plan fell within ERISA's coverage, and since ERISA supercedes all state laws which "relate to" a welfare benefit plan, 29 U.S.C. §1144(c)(2), the Court of Appeals affirmed the District Court's dismissal of the appellants' state law claims and its issuance of the injuction against the Commissioner on the ground of federal preemption. (A-13-17.)

In this Court neither the individual appellants nor the Commissioner have pursued their contention that the laws under

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* The Second Circuit summarized the issues on appeal as follows:

> This appeal presents three principal questions: first, whether the district court was correct in holding that an unfunded severance pay policy is an ERISA plan under either §1002(1)(A) or §1002(1)(B); second, if Burlington's severance policy is an ERISA plan, whether the plaintiffs' state law claims and §198-c (insofar as it applies to severance plans) are preempted; finally, whether Burlington should be estopped from raising a defense of preemption because it allegedly never sought to comply with ERISA's protective reporting and disclosure requirements.

(A-8.)

which their claims were asserted did not "relate to" Burlington's severance benefit plan within the meaning of ERISA's preemption provision. (Jurisdictional Statement of Gilbert, *et al.* at 7-8 n.7; *see* Commissioner's Jurisdictional Statement generally.) Thus, the sole issue before the Court, as framed by the appellants, is the construction of the term "employee welfare benefit plan" within the meaning the ERISA. (*Id.* at i.) Burlington contends that this issue is not properly before the Court.

II

MOTION TO DISMISS

Burlington moves to dismiss the appeals on the ground that there is no basis for them pursuant to 28 U.S.C. §1254(2). Furthermore, even treating the jurisdictional statements as petitions for certiorari, the petitions should be denied due to the absence of any conflict of decisions or any substantial federal question.

Invocation of 28 U.S.C. §1254(2) is improper because (a) a state statute was not invalidated, (b) the individual appellants seek to have this Court review the dismissal of their non-statutory claims which can only be reviewed after a grant of certiorari, and (c) the only issue raised concerns the construction of a federal statute.

The court below did not hold that the state statute at issue, Section 198-c of the New York Labor Law, was invalid. It held that the appellants' statutory and common law claims under state law were preempted by ERISA, and that the Commissioner's exercise of authority over Burlington's severance benefit plan was improper. (A-13, 16, 25, 31.)

Since Section 1254(2)'s jurisdictional grant is to be narrowly construed, *Silkwood v. Kerr-McGee Corp.* ("*Silkwood*"), ____ U.S. ____, 104 S.Ct. 615, 620 (1984), the fact that Section 198-c of the New York Labor Law remains in effect, uninvalidated by the court below, deprives this Court of appellate jurisdiction. The decision below is therefore reviewable only by writ of certiorari. *See Silkwood*, 104 S.Ct. at 620-21; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 953 (1983); *Hanson v. Denckla*, 357 U.S. 235, 244 (1958)(involving the Court's jurisdiction under 28 U.S.C. §1257); *Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976), *cert. denied sub nom. Minnesota v. Alexander*, 430 U.S. 977 (1977) (in which this Court dismissed an appeal for want of jurisdiciton from a decision holding that a state statute invaded the Federal Government's immunity from unconsented state regulation and was therefore unenforceable.)

This case is similar to *Silkwood, supra*, in which this Court held that Section 1254(2) jurisdiction was improper where the appeal was from a Court of Appeals decision vacating a jury's award of punitive damages, which had been based upon an Oklahoma statute, on the ground of federal preemption. The Court explained that "[w]hile the award itself was struck down, the statute authorizing such awards was left untouched." 104 S.Ct. at 621. Such is the case here. The appellants' claims under state law were dismissed and the Commissioner was enjoined from acting under Section 198-c, but the laws themselves were not invalidated. Since "[j]urisdiction under 28 U.S.C. §1254(2) is properly invoked only where a court of appeals *squarely* has 'held' that a state statute is unconstitutional..." or repugnant to a federal statute, *Burger King Corp. v. Rudzewicz*, ____ U.S. ____, 105 S. Ct. 2174, 2181 n.12 (1985) (emphasis in original), Section 1254(2) jurisdiction is improper here.

Even if the Second Circuit's decision could be deemed an invalidation of Section 198-c, the individual appellants' attempt to have this Court review the dismissal of their non-statutory claims under Section 1254(2) is improper because review under that jurisdictional statute is expressly limited to judgments invalidating state statutes. The individual appellants had no private right of action under a state statute, however, and therefore have no standing to appeal under Section 1254(2). During the pendency of the District Court action, the New York Court of Appeals held that Section 198-c does not support a private right of action such as the individual appellants asserted in their complaint.* *See Stoganovic v. DiNolfo*, 61 N.Y.2d 812 (1984), *aff'g* 92 A.D.2d 729, 461 N.Y.S.2d 121 (4th Dept. 1983). *See also Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 543 (1984); *Sasso v. Vachris*, 106 A.D.2d 132, 482 N.Y.S.2d 875, 881 (2d Dept. 1984)("[t]he Court of Appeals recently indicated that no civil cause of action is to

* The courts of New York have not ruled on the availability of a private right of action to the Commissioner. In light of the absence of a statutory predicate, however, it seems likely that such a claim would not be cognizable.

be implied from section 198-c of the Labor Law [citation omitted]. Thus, any pre-emption or jurisdiction question with respect to this statute is academic.")*

The individual appellants concede in their jurisdictional statement that "... the question presented is technically within the Court's certiorari jurisdiciton." (Jurisdictional Statement of Gilbert, *et al.* at 1 n.1.) However, far from being a mere "technical" joinder of the Court's appellate jurisdiction with its certiorari jurisdiction, the Court's appellate jurisdiction in this case exists only by virtue of the improper joinder. Absent such joinder the individual appellants' case would be academic.

Finally, the appellants misapply Section 1254(2) because their jurisdictional statements raise only a narrow issue of statutory construction, *to wit*, whether the provisions of this particular employer's severance benefit policy constitute an "employee welfare benefit plan" under ERISA? (Jurisdictional Statements at i.) Similar issues have been addressed in cases where preemption was not an issue. Indeed, the individual appellants have expressly abandoned the preemption issue addressed by the Second Circuit. (Jurisdictional Statement of Gilbert, *et al.* at 7-8 n.7.) Accordingly, their reliance upon Section 1254(2) is improper and, again, certiorari is the only appropriate mechanism for review by this Court.

Furthermore, even if the present appeals were treated as petitions for certiorari, review by this Court would not be appropriate. Neither a conflict of decisions nor a substantial federal question exists, as shown in the following discussion on Burlington's alternative motion to affirm.

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* Although the individual appellants' complaint asserted claims under two North Carolina statutes, these laws do not govern their rights to severance benefits for reasons unrelated to federal preemption and the dismissal of their claims under these laws is not a part of their appeal.

III

MOTION TO AFFIRM

Alternatively, Burlington moves to affirm the judgment of the United States Court of Appeals for the Second Circuit. The sole issue raised before the Second Circuit, and not abandoned here, is whether Burlington's written severance benefit policy, as administered by the company, was an ERISA "plan". This question was addressed by the court below and its resolution of the issue was in conformity with the decisions of four other Circuits and numerous District Courts. The appellants concede the absence of any authority to support their position and are left to argue that these courts have not "truly" addressed the issue and that the grounds for their decisions have not been "impressive". (Jurisdictional Statement of Gilbert, *et al.* at 11.)

A. *No Conflict Of Decisions*

The judgment of the Second Circuit appealed from was an affirmance of a District Court decision which was not only "well-considered" (A-7) but in accord with analagous Fourth, Seventh and Eighth Circuit decisions, *Dhayer v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied sub nom. Sutton v. Weirton Steel Division of National Steel Corp.*, ____ U.S. ____, 104 S.Ct. 2387 (1984), *aff'g* 571 F. Supp. 316, 329-30 (N.D. W. Va. 1983)(holding that an employer's severance benefit policy was a "plan" under ERISA); *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209, 1211 (7th Cir. 1983); *Pinto v. Zenith Radio Corp.*, 618 F.2d 110 (7th Cir. 1980)(table), *aff'g* 480 F. Supp. 361 (N.D. Ill. 1979)(holding that a severance pay policy set forth in a policy manual was a "plan" covered by ERISA); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), *cert. denied sub nom. Dependahl v. Kalmanovitz*, 454 U.S. 1084 (1981), *aff'g* 491 F. Supp. 1188 (E.D. Mo. 1980)(to the same effect), and extensive district court authority, *Odgen v. Michigan Bell Telephone Co.*, 571 F. Supp. 520 (E.D. Mich. 1983); *Jung v. FMC Corp.*, ____ F. Supp. ____, No. C-82-0018-WAI (N.D.. Cal. April 28, 1983); *Armco, Inc. v. Ludwick*, 3 E.B.C. 1574 (D. Kan. 1982) (holding that an employer's supplemental unemployment benefit

plan was covered by ERISA); *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357, 1362 (D.N.J. 1982) (holding that "an internal policy statement that allowed severance pay as a purely discretionary matter" was a "plan" under ERISA); *Donnelly v. Aetna Life Insurance Co.*, 465 F. Supp. 696, 698 (E.D. Pa. 1979) (holding that a severence pay policy set forth in a policy manual was a "plan" covered by ERISA); *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 359 (E.D. Mo. 1979) (to the same effect).

After the District Court's decision, but prior to resolution of the appeal by the Second Circuit, the Ninth Circuit rendered three opinions, each holding that an employer's unfunded severance benefit policy can constitute a "welfare benefit plan" under ERISA. *Jung v. FMC Corp.*, 755 F.2d 708, 710 and n.2 (9th Cir. 1985); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1984), *cert. denied*, ____ U.S. ____ (October 7, 1985). *Cf. Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1520-21 (11th Cir. 1985).

Shortly after the Second Circuit's decision, the Fourth Circuit decided *Slack v. Burlington Industries, Inc.* ("*Slack*"), ____ F.2d ____, No. 84-2241 (4th Cir. September 3, 1985). This case, concerning the identical severance benefit policy and involving the same sale of divisions by Burlington, held that Burlington's policy was an ERISA "plan" and that the state law claims asserted by a separate group of former Burlington employees were preempted by ERISA.* Slip op. at 10-19.

Several subsequent District Court decisions have reached the same result regarding other severance benefit policies. *Pabst Brewing Co. v. Anger*, 610 F. Supp. 214 (D. Minn. 1985); *Adcock v. Firestone Tire & Rubber Co.*, ____ F. Supp. ____, No. 3-83-0037 (M.D. Tenn. August 6, 1985); *DiCarlo v. Supermarkets General Corp.*, ____ F. Supp. ____, No. 83 Civ. 8236

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* In *Slack*, the Fourth Circuit also affirmed the District Court's grant of summary judgment to Burlington on the issue of the plaintiff's entitlement to severance benefits. Slip op. at 23-26.

(S.D.N.Y. May 31, 1985); *Ridens v. Voluntary Separation Program*, 610 F. Supp. 770 (D. Minn. 1985).

Thus, at the present time at least five Circuits and numerous District Courts have decided the issue presented by these appeals in like manner. Two Circuits have addressed the identical issue and have reached the same conclusion, based upon the same reasoning, without a dissent. The appellants have failed to cite the Court to even a single decision under federal law decided to the contrary, and Burlington is aware of none. (*See* Appendix "B" to the Jurisdictional Statement of Gilbert, *et al.*) It is therefore manifest that the Court's consideration of this case would be inappropriate on the basis of a conflict of decisions.

B. *No Substantial Federal Question*

The question presented on this appeal is so unsubstantial as not to require further argument.

1. *Decision Expressly Limited to Severance Benefits*

Contrary to the individual appellants' assertion, the Second Circuit did not give the statutory term "plan" an "infinitely expansive construction ..." encompassing "virtually every aspect of the employer-employee relationship...." (Jurisdictional Statement of Gilbert, *et al.* at 10-11.) The Court of Appeals carefully limited its holding, distinguishing severance benefits from other types of benefits and "payroll practices" which, it said, may not be covered by ERISA. (A-13.)

This distinction is consistent with United States Department of Labor regulations and decisional law interpreting ERISA. Regulations codified at 29 C.F.R. §2510.3-1 provide that unfunded benefit arrangements normally associated with compensation such as overtime pay, shift premiums, disability pay, holiday pay, and compensation for periods of absence due to military service and service as a juror, are not encompassed by the definition of "employee welfare benefit plan" within the meaning of ERISA. 29 C.F.R. §2510.3-1(b). In contrast, this

same regulation expressly provides that arrangements for the payment of severance benefits are within ERISA's scope. 29 C.F.R. §2510.3-1(a)(3).*

In *Scott v. Gulf Oil Corp.*, *supra*, the Ninth Circuit sustained the reasonableness of this construction of ERISA, explaining that severance benefits are uniquely appropriate for ERISA coverage due to the danger of default in the context of large scale terminations. Such danger does not exist for benefits payable during the course of employment such as for medical leaves or vacations.** 754 F.2d at 1503.

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* In the opinion below, the Second Circuit noted that the lengthy list of benefits excluded from ERISA's coverage set forth at 29 C.F.R. §2510.3-1(b)(3) "was not mean[t] to be exhaustive" (A-13), thereby indicating that most, if not all, types of unfunded benefit arrangements, other than for the payment of severance benefits, would fall outside the coverage of ERISA. The court's reference to this regulation directly refutes the Commissioner's assertion that the Second Circuit's construction of ERISA could be deemed to include plans which provide for paid holidays and sick leave (Commissioner's Jurisdictional Statement at 8), since the regulation expressly excludes paid holidays and sick leave from the definition of an "employee welfare benefit plan." 29 C.F.R. §2510.3-1(b).

** The Ninth Circuit reasoned that:

> [A]n employer who ... terminates a large number of employees at once, may be faced with an extremely large severance liability. For these reasons, the danger that an employer may, because of lack of funds, default on an obligation to provide severance pay is greater than the danger of default on an obligation to provide medical leaves or vacations. This type of default is a central concern of ERISA. [Citation omitted.] Therefore, it is reasonable for the Labor Department regulations to include severance pay, even when funded out of an employer's general assets, as an employee welfare benefit under ERISA, while excluding medical leaves, vacations, etc., as 'payroll practices' when similarly funded.

754 F.2d at 1503.

In *California Hospital Ass'n v. Henning*, ____ F.2d ____, Nos. 83-6381; 83-6416 (9th Cir. September 6, 1985), the Ninth Circuit gave effect to its earlier reasoning in *Scott*, holding that vacation pay arrangements are not "plans" within the meaning of ERISA. Significantly the court distinguished vacation pay from severance pay in light of ERISA's purpose. In *Slack, supra*, the Fourth Circuit also recognized the distinction between severance benefit plans, which are subject to ERISA, and other types of benefit plans, which are not. Slip op. at 14.

Thus, the individual appellants' assertion that the decision below means that "... virtually every aspect of the employer-employee relationship is covered by ERISA" (Jurisdictional Statement of Gilbert, *et al.* at 11) is not only contradicted by the opinion below, but by those decisions which have followed it.

2. *Lower Federal Courts Have Not Failed To Address The Definitional Issue Raised by Appellants*

A second mischaracterization in the individual appellants' jurisdictional statement is their assertion that the courts below, and other courts, have failed to address the issue of what is an ERISA "plan"? Although this was not the only issue raised by the appellants below, they have limited their appeals to this question, contending that no court has ever "truly" addressed it. (Jurisdictional Statement of Gilbert, *et al.* at 11.) This is simply false.

To begin with, the statute itself defines the terms "employee welfare benefit plan" and "welfare plan" to mean:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical,

> or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in Section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).*

29 U.S.C. 1002(1).

The Ninth and Eleventh Circuits have given the parameters of this definition detailed, generic treatment. *See Scott v. Gulf Oil Corp.*, 754 F.2d at 1503-04; *Donovan v. Dillingham*, 688 F.2d 1367, 1372-73 (11th Cir. 1982) (*en banc*).** Numerous other courts, such as those below, have addressed the limited definitional issues left unanswered by the statute through an analysis of the specific plans before them.

In this case, the Second Circuit need not have undertaken yet another lengthy exposition of this issue because such treatment was not warranted by the facts. Burlington had a written plan document with well-defined eligibility criteria. During the relevant time period, Burlington consistently applied

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* This provision refers to benefits in Section 302(c) of the Labor Management Relations Act of 1947, 29 U.S.C. §186(c). United States Department of Labor regulations state that Section 302 duplicates to a large extent the benefits enumerated in Section 3(1)(A) of ERISA, 29 U.S.C. §1002(1)(A), except that Section 302 adds holiday and severance benefits. 29 C.F.R. §2510.3-1(a)(3).

** In *Donovan v. Dillingham*, the Eleventh Circuit, after a lengthy analysis, identified the requisites of a "plan, fund or program" as follows:

> In summary, a 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.

688 F.2d at 1373.

and adhered to those criteria. Procedures for the processing of severance benefits were well established. Employees were notified of the benefits available to them prior to the sale of the divisions. Notification and grievance procedures were in existence.

To the extent that Burlington may have failed to technically adhere to all of ERISA's many reporting and disclosure requirements, the individual appellants' raised this issue below in terms of whether Burlington should be estopped from asserting the defense of preemption. The estoppel issue was given considerable attention by the Second Circuit which held that estoppel was not an appropriate or desireable remedy. The Court left the underlying issue of whether such alleged violations constituted arbitrary and capricious conduct to the District Court. (A-17-19.) This holding is, again, in conformity with consistent decisional law. *See Blau v. Del Monte Corp.*, 748 F.2d at 1352; *Donovan v. Dillingham*, 688 F.2d at 1372; *Dependahl v. Falstaff Brewing Corp.*, 491 F. Supp. at 1195.

3. *The Decision Below Effectuated Congressional Intent Of Uniform Enforcement of Severance Benefit Plans Under Federal Law*

It is ironic that in conjunction with this appeal the individual appellants ask the questions "Is the state common law of contracts . . . dead?" and "Are state wage collection and benefit enforcement statutes soon to be extinct?" (Jurisdictional Statement of *Gilbert, et al.* at 23), for these appellants would have been without a judicial remedy were they to have relied upon such state laws alone. As explained above, the New York Court of Appeals has held that Section 198-c of the New York Labor Law does not give rise to a private civil action such as the individual appellants asserted below. Furthermore, the individual appellants' common law contract claim would have failed under

well-established principles of New York law.* Thus, ERISA provided the individual appellants with their only cognizable claims for relief and this is why they themselves commenced an action in the District Court asserting claims under ERISA.

Furthermore, it is the patchwork of inconsistent state laws enforcement mechanisms which Congress, in enacting ERISA, sought to replace with a comprehensive federal enforcement scheme. The individual appellants' common law claim that a contract to provide severance benefits may be implied from handbooks and manuals is viewed differently in nearly every state.** Employees fair no better under state statutory law. Two

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* Under New York law neither an employee handbook nor a policy manual constitute an agreement which can be enforced against the employer which publishes those documents. *King v. Cornell University*, 81 A.D.2d 712, 439 N.Y.S.2d 445 (3d Dept. 1981); *Edwards v. Citibank, N.A.*, 74 A.D.2d 553, 554, 425 N.Y.S.2d 327, 328-29 (1st Dept. 1980); *Marinzulich v. National Bank of North America*, 73 A.D.2d 886, 424 N.Y.S.2d 1014 (1st Dept. 1980); *Chin v. American Telephone & Telegraph Co.*, 96 Misc. 2d 1070, 1072-73, 410 N.Y.S.2d 737, 739 (Sup. Ct. N.Y. Cty. 1978), *aff'd n.op.*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dept. 1979).

** While some states hold that such manuals generally constitute binding contracts, *e.g.*, *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 612-19 (1980); *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 540-41 (1949); *Dahl v. Brunswick Corp.*, 277 Md. 471, 476 (1976), other states hold that manuals and policy statements are not binding, *e.g.*, *Gates v. Life of Montana Insurance Co.*, 196 Mont. 178, 183 (1982); *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 55 (1976); *Heideck v. Kent General Hospital, Inc.*, 446 A.2d 1095 (Del. 1982). Still other states engage in no presumption, permitting the intent of the parties to govern the determination completely. *See, e.g.*, *Smith v. Kerrville Bus Co., Inc.*, 709 F.2d 914 (5th Cir. 1983) (construing Texas law); *Gee v. Federal Express Corp.*, 710 F.2d 1181 (6th Cir. 1983) (applying Tennessee law, allowing employer to set terms for discharge); *Griffin v. Housing Authority of Durham*, 62 N.C. App. 556, 557 (1983) (personnel policies are not part of employment contract where not expressly incorporated therein); *Hepp v. Lockheed-California Co.*, 86 Cal. App. 3d 714, 719, 150 Cal. Rptr. 408 (2d Dist. 1978). Finally, even in those states where manuals have been held to be binding, some states have upheld employers' express disclaimers of intent to be bound. *E.g.*, *Batchelor v. Sears, Roebuck & Co.*, 574 F. Supp. 1480, 1484-85 (E.D. Mich. 1983).

states have no wage collection statutes at all; eight states do not have any statutory administrative enforcement provisions for the collection of wages which would encompass severance benefits; and fourteen additional states have no statutory provisions for the collection of severance benefits (as opposed to salary). (*See* "Analysis of Administrative Wage Collection Authority In The Fifty States", at a-xvii of Burlington's Brief before the Second Circuit.) In addition, the statutory authority for administrative wage collection appears to be doubtful in several other states.

Thus, when the varied state laws relating to an employer's common law contractual obligations are considered with this haphazard state statutory scheme, the value of a national system of regulation is evident. National uniformity is particularly important, where, as here, a multi-state plan is at issue. In the decision below, the Second Circuit stated:

> ...the plaintiffs here were employed in 16 different states. The policy favoring national uniformity in this field, therefore, strongly supports preemption.

(A-15)

The individual appellants and the Commissioner, preoccupied with illusory contradictions and unintended effects purportedly wrought by ERISA's preemption provision, simply ignore the effective federal system that Congress has created. Thus, ERISA provides for meaningful disclosure to plan participants, 29 U.S.C. §1133, and imposes fiduciary standards on those with discretion regarding covered plans, 29 U.S.C. §1104. The Secretary of Labor is empowered to investigate alleged violations of the Act, 29 U.S.C. §1134, and to commence suit in an appropriate District Court to enforce the Acts, 29 U.S.C. §1132(a) (2), (4), (5), (6). Plan participants are also entitled to commence civil actions, and can recover, in the court's discretion, a reasonable attorney's fee. 29 U.S.C. §1132(g).

Therefore, the asserted absence of administrative processes and the claimed need to institute expensive civil litigation to recover severance benefits are nothing more than the appellants' inventions conjured up in an attempt to persuade this Court that employees will be left without adequate remedies if the decision below is affirmed. The fact is that the individual appellants here, and a majority of employees throughout the country, can only benefit by a decision which will permit the United States Department of Labor and, if necessary, the federal courts to enforce the provisions of severance benefit plans.

In any event, as the Fourth Circuit observed in *Slack* "[t]he fact that employees may sometimes wish to forego these advantages of ERISA coverage in favor of arguably more generous state statutes does not allow us to escape the clear direction of Congress." Slip op. at 15.

4. *No Conflict Between The Decision Below And Any Decision Of This Court*

The individual appellants and the Commissioner, relying heavily upon an incorrect analysis of a decision of this Court which Justice Powell characterized as having "little consequence beyond the resolution of this case," argue that the decision in *Nachman Corp. v. Pension Benefit Guaranty Corp. ("Nachman")*, 446 U.S. 359 (1980), can be read to establish an exception to ERISA's preemption provision for direct employer liability in common law contract. *Id.* at 397 (Powell, J. dissenting). This issue did not arise, was not addressed, and was not decided in *Nachman*, but was subsequently addressed by the Third Circuit in *Murphy v. Heppenstall Co. ("Murphy")*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982).

Murphy, like *Nachman*, arose out of a collective bargaining agreement under which the employer agreed, and then failed,

to fund adequately a pension plan.* 635 F.2d at 234-37. Again, as in *Nachman*, the plaintiffs in *Murphy* sought to establish the employer's liability, as opposed to the plan's liability, under the pension agreement. *Id.* Finding that any state law claims would be preempted by ERISA, the court nevertheless considered and rejected the employer's contention that the employees' contract claim was preempted. The basis for this decision was not, as the appellants suggest, that state common law contract claims are excepted from ERISA's preemption provision, but rather that the employees' claim was not a state law claim at all. The court explained:

> 29 U.S.C. §1144 supersedes 'state law relating to' a pension plan. *The employees' contract claim against the employer is not a state law claim.* Rather, their claim arises under both the federal common law of labor-management contracts, and the federal common law of pension plans. *Because the employees are seeking to enforce a provision of a collectively bargained pension agreement, federal common law applies."*

Id. at 237 (footnote omitted and emphasis supplied).

Thus, when, in rejecting the appellants' argument below, the Court of Appeals stated that "[t]he short answer is that *Nachman* and its progeny were based on federal rather than state law", the Court was completely correct. (A-16.) There is no apparent conflict between the decision below and *Nachman* and none of the "consequences" which the appellants foresee arising out of the decision below are expressed in or would arise from the Second Circuit's opinion. Such unsupported prognostications

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* *Nachman* and *Murphy* are pension cases involving interpretations of Title IV of ERISA, §§4001-4082, 29 U.S.C. §1301 *et seq.* "Employee welfare benefit plans" are not governed by Title IV of ERISA and cases interpretating Title IV are therefore without application to severance plans like Burlington's. *Gutting v. Falstaff Brewing Corp.*, 541 F. Supp. 345, 347 (E.D. Mo. 1982), *rev'd on other grounds*, 710 F.2d 1309 (8th Cir. 1983).

as resultant age discrimination (Jurisdictional Statement of Gilbert, *et al.* at 22) were not raised by the appellants below and are completely outside the record.

5. *No Conflict Between The Decision Below And Any Regulation Of The Department Of Labor*

Finally, the Commissioner argues that the Second Circuit's holding is in conflict with interpretative regulations of the United States Department of Labor codified at 29 C.F.R. §2510.3-1. As indicated above, this regulation excludes certain specific "payroll practices" from ERISA's coverage because they are not considered "welfare benefit plans". Although the Commissioner concedes that this regulation does not expressly mention severance benefits, she argues that because the list of benefits included in the regulation was not meant to be exhaustive and because severance benefits are similar in nature to the listed benefits, severance benefits should be excluded from ERISA's coverage.

The Commissioner omits from her argument the fact that this very regulation provides that the effect of Section 1002(1)(B) of ERISA "is to include within the definition of 'welfare plan' those plans which provide . . . severance benefits . . . ." 29 C.F.R. §2510.3-1(a)(3). Also omitted from the Commissioner's argument is reference to the agency's statement in 1979 that "since the provision of severance pay is one of the recognized purposes for a welfare plan under [Section 1002(a)], it would seem that severance pay plans would in virtually all cases be welfare plans . . . ." 44 Fed. Reg. 11763 (March 2, 1979).

Any doubt as to the Congressional intent that severance benefits be subject to ERISA was dispelled in 1980 when Congress added the language found at 29 U.S.C. §1002(2)(B):

> The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter

> providing one or more exempt categories under which — (1) severance pay arrangements . . . shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans.

As the Fourth Circuit observed in *Slack* "[t]his amendment, adopted after the Secretary of Labor had promulgated the regulations [codified at 29 C.F.R. §2510.3-1], effectively sanctioned these regulations by statute and provided that severance pay arrangements whether treated as pension plans or welfare plans would be subject to the Act." Slip op. at 13.

C. Conclusion

Since the decision below is amply supported by logic and precedent, is in conformity with the decisions of the many other Courts of Appeals which have considered the matter, and raises no substantial federal question, the judgment below should be affirmed.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the court below affirmed.

Dated: New York, New York
October 9, 1985

Respectfully submitted,

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Supreme Court, U.S.
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Nos. 85-441 and 85-460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRVING GILBERT, *et al.*, and
LILLIAN ROBERTS, as Commissioner of Labor
of the State of New York,

Appellants,

—against—

BURLINGTON INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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THE QUESTIONS PRESENTED BY THE APPELLANTS MERIT PLENARY CONSIDERATION

Appellants reply jointly to the appellee's numerous misstatements of fact and law.

A. *Appellee Erroneously Suggests Appellants Have No Remedy Under State Law, and That Plenary Consideration Would Prove an Academic Exercise.*

Appellee would have this Court believe that if it were to find that state law, and not ERISA, applies to the provisions of a simple employer personnel policy or handbook, appellants would be without a remedy, both in fact and in law.[1] Nothing could be further from the truth.

1. Appellants Have a Private Cause of Action Under New York Labor Law § 198-c.

Appellee states that "the New York Court of Appeals [has] held that Section 198-c does not support a private right of action such as the individual appellants asserted in their complaint." (Motion at 8-9, 16-17). This contention is based upon nothing but wishful thinking.

The Court of Appeals has never held that there is no private cause of action under § 198-c; rather, it has pointed out that there is no private cause of action *against individual officers or agents of a corporation.* ("We have recently held that the provisions of Section 198-a subjecting *corporate officers* to criminal sanctions for violation of the article indicates a legislative intent that *they not* be subject to civil liability.") *Patrowich* v. *Chemical Bank and Harold D. Corney,* 63 N.Y.2d 541, 543, 483 N.Y.S.2d 659, 661, 473 N.E.2d 11 (1984). (Emphasis added.) The recent decision referred to is *Stoganovic* v. *Dinolfo,* 61 N.Y.2d

[1] Although appellee acknowledges at page 2 of its Motion to Dismiss or Affirm (hereinafter "Motion") that the appellant Commissioner entered orders under New York Labor Law § 198-c

(footnote continued on following page)

812, 473 N.Y.S.2d 972, 462 N.E.2d 149 (1984), *aff'g* 92 A.D.2d 729, 461 N.Y.S.2d 121 (4th Dept. 1983).[2]

Since it is only against the corporate employer and *not* against any of its officers or agents that the appellants have stated claims (See CA-9, 13-14),[3] their claims under the New York Labor Law are unassailable.[4]

2. Appellants Have Valid Claims at Common Law.

It has long been recognized under New York law that an employer's promise to provide benefits is *enforceable* at common law.[5] This is so whether the promise is an

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awarding the individual appellants their severance pay, appellee then seems to forget this fact when, at pages 8 and 16, it argues that the appellants have no remedy under state law. It is the invalidation of the state law under which the Commissioner's orders were issued which appellants challenge in these appeals.

[2] In *Stoganovic, supra,* 461 N.Y.S.2d at 122, the court noted that there are several provisions of the New York Labor Law, including sections 197 and 198, which recognize the propriety of implying a civil cause of action against a corporate employer for the recovery of wages, but *no* provisions of the Labor Law which "refer to civil actions for the recovery of wages against officers or agents of corporations." The former are authorized, therefore, and the latter not. Moreover, under N.Y. Labor Law § 196(b), the Commissioner is empowered to file suits *on behalf of* employees. *Cf.* Motion at 8 n.*.

[3] Citations to the Joint Appendix before the Second Circuit are designated as "(CA—)".

[4] It follows that the appellee's contention that appellants "have no standing to appeal under Section 1254(2)", Motion at 8, must also fail. *See* further discussion of jurisdictional question, *post,* at pp. 8-9.

[5] The four appellate division decisions the appellee cites in support of the opposite proposition (Motion at 17 n.*) are totally inapposite because, in each, what the plaintiffs were attempting to enforce were not *benefit* provisions, but representations regarding limitations which might be imposed upon an employer's right to discharge. Given the time-honored doctrine of "at-will employment", it would have been in derogation of the common law to

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oral or written one, and whether it is embodied in a policy, manual or more formal contract. Indeed, this principle has been recognized not only by the New York Court of Appeals, but by virtually every appellate division and federal court to apply New York law on the question for the last fifty years.[6]

Since appellants' claims are in complete conformity with this principle, their common law claims, like their statutory claims, are unassailable.

3. Appellants Are Entitled to Payroll and Vacation Severance Under the Terms of the Company's Policy Manual.

The district court's rejection of Burlington's motion for summary judgment lays to rest, at this stage of the pro-

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recognize the existence of an implied agreement to terminate only for cause, and most courts have refused to do so. No such impediment exists here, however, where employees seek to enforce explicit promises to provide benefits in the event of discharge rather than implied promises not to discharge without cause.

[6] *See, e.g., Ingrassia* v. *Shell Oil Co.*, 394 F.Supp. 875 (S.D.N.Y. 1975) (oral and written promises to pay severance pay enforceable; New York law applied); *Jewish National Fund* v. *Jack Garland,* No. 83 Civ. 7796 (S.D.N.Y. January 3, 1985) (severance benefits to be awarded; dispute as to whether payment should be calculated on basis of personnel practices agreement or lifetime contract); *In re W. T. Grant Co.,* 474 F.Supp. 788 (S.D.N.Y. 1979), *aff'd* 620 F.2d 319 (2nd Cir.), *cert. den'd,* 446 U.S. 983 (1980) (severance pay claims under store manual, personnel manual, and collective bargaining agreements entitled to priority as expenses of administration of the bankrupt's estate); *Gillette* v. *Heinrich Motors, Inc.,* 55 A.D.2d 841, 390 N.Y.S.2d 330, *aff'd* 44 N.Y.2d 661, 405 N.Y.S.2d 33, 376 N.E.2d 194 (1978) (right to salary continuation benefits described in disability plan held enforceable); *Turski* v. *Chiesa,* 58 A.D.2d 828, 396 N.Y.S.2d 667 (2nd Dept. 1977) (benefits due under profit-sharing arrangement enforceable); *Morschauser* v. *American News Co.,* 6 A.D.2d 1028, 178 N.Y.S.2d 279 (1st Dept. 1958) (oral representation that it was the company's practice to pay severance pay enforceable); *Wanhope* v. *Press Co.,* 256 A.D. 433, 10 N.Y.S.2d 797, *aff'd* 281 N.Y. 607, 22 N.E.2d 171 (1939) (written severance and vacation pay provisions enforceable).

ceedings, appellee's claim that appellants are excluded from Burlington's severance policy because many were subsequently employed by a new employer. (Motion at 3.)

The policy for salaried employees in effect when appellants were terminated stated that "[e]mployees are eligible to receive payroll severance if they are regular full-time salaried employees who are involuntarily terminated from the Company." (A23).[7]

It was not until mid-1983, nearly a year and a half after appellants were terminated, that language disqualifying employees who are involved in a plant or division sale and "have the opportunity to continue their employment with a successor employer" was inserted in the severance policy. The individual appellants cannot be said to have been affected by this belated amendment.

B. *Appellee Misrepresents Federal Decisional Law and Administrative Regulation.*

1. This Is Not Just a Severance Pay Case.

In a last-minute attempt to make the resolution of the issue presented herein appear less important, appellee suggests for the first time that the question—*what is an employee benefit plan?*—can easily be resolved by merely looking to the Department of Labor's "payroll practices" regulation, 29 C.F.R. § 2510.3-1(b). (Motion at 12-14).

Thus, according to the appellee's reading of the regulation, the line of demarcation is clear: personnel policies

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[7] Termination was defined as "a complete separation from the Company's payroll." (CA 358). It was "involuntary" if it was not at the request of the employee and not the result of willful misconduct. (A23, CA-367). The only full-time employees excluded from the policy, and thus ineligible to receive benefits, were those who were either "terminated because of early retirement, mandatory retirement, death, misbehavior, lack of cooperation, willful negligence, or other unfriendly acts against the Company or towards its management," (A24) or "re-employ[ed] *by the Company*" after their separation from the payroll. (CA-353, 354. (Emphasis added).

and payroll practices expressly mentioned in the regulation, such as personnel policies and payroll practices that provide for the payment of vacation pay, holiday pay, disability pay, sick leave allowances and benefits associated with other types of medical leave, are *not* welfare plans within the meaning of the Act, while a personnel policy or payroll practice not expressly mentioned, such as one that provides for the payment of *severance* benefits *is* a welfare plan. (*Id.*)

As the Supreme Judicial Court of Massachusetts has pointed out:

> Section 1002(1) of 29 U.S.C. defines any employer-established program which provides vacation benefits as an employee welfare benefit plan . . . [The] United States Department of Labor, however, states that payments of compensation out of an employer's general assets while an employee is on vacation are not made pursuant to an employee welfare benefit plan. 29 C.F.R. § 2510.3-1(b)(3) (1984).

Barry v. *Dymo Graphic Systems, Inc.*, 394 Mass. 830, 478 N.E.2d 707, 712 (Mass. 1985). Thus, if, as the appellee has contended and as the district and circuit court decisions upon which it relies have concluded, a simple personnel policy or payroll practice is a *plan* or *program* within the meaning of the Act, then the Department of Labor's regulation exempting payroll practices from ERISA coverage "is at clear odds with language of the statute itself and an invalid arrogation of power by the Department.[8] *Barry, supra,* 478 N.E.2d at 712.

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[8] Appellee cannot escape the fact that the Department of Labor's "list" of excluded practices includes many benefits that are explicitly referred to in ERISA, to wit, benefits in the event of sickness, accident or disability, vacation benefits, holiday pay, severance pay, and benefits associated with training programs. *Cf.* 29 C.F.R. § 2510.3-1(b)(2) and (3) with 29 U.S.C. § 1002(1) and § 186(c).

The appellee cannot have it both ways. Either anything and everything is a "plan" within the meaning of the Act, in which case all policies, practices and personnel provisions which provide one or another of the benefits listed in 29 U.S.C. § 1002(1) are ERISA-covered "welfare plans," *including* the policies and practices referred to in the regulation, or no payroll policies, practices and personnel provisions are plans within the meaning of the Act, *regardless* of the type of benefit provided. The middle ground which the appellee seeks to strike for the first time in its Motion to Affirm is untenable. The statute does not admit of the making of any distinctions based on the type of benefit involved between holiday, vacation, sick leave and disability benefit arrangements, on the one hand, and severance benefit arrangements, on the other.[9]

Thus, far from having put the questions posed by appellants to rest, the Department of Labor's regulation only serves to underscore the need for a definitive resolution as to the meaning of ERISA's basic terms.

2. This Is a Case About What Constitutes a Plan.

Appellee's argument that this Court should respect the "consistency" with which other courts have avoided resolving the question of what constitutes a plan requires no elaborate analysis. Of the nineteen cases cited in the Motion to Dismiss as having reached the same result as the Court below, only two—by appellee's own count—have even addressed the definitional issue. (Motion at 15.) Even that number is exaggerated.

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[9] Indeed, if the statute can be read to permit of any distinction at all, it is the opposite of that argued for by the appellee. Thus, rather than "most, if not all, types of unfunded benefit arrangements, other than for the payment of severance benefits, . . . fall[ing] outside the coverage of ERISA," Motion at 13n.*, it would appear that severance benefits may be one of the few types of benefits that are only covered when provided through a pooled and funded program. 40 Fed. Reg. 34527 (Aug. 15, 1975) ("Section 302(c) of the LMRA refers only to funded programs.")

While *Donovan* v. *Dillingham,* 688 F.2d 1367 (11th Cir. 1982) did search the statute for the meaning of the term "plan," it did so in a context so different[10] that its answer, arrived at with difficulty, offers little guidance here. *Scott* v. *Gulf Oil Corp.,* 754 F.2d 1499 (9th Cir. 1985), while more factually apposite, fails to engage in the analytical task appellants urge upon this Court, and relies instead upon quotations from *Donovan* for its conclusion that the severance benefits at issue in *Scott* are provided by means of a plan.

Appellee's other efforts to prevent plenary consideration of the definitional question may be dismissed with the following observations:

1. This Court has never ruled on the question.
2. The first circuit court which tried to answer the question foundered on the statutory tautology,[11] and the second followed it.[12]
3. The case appellee relies upon to dispute the applicability of *Nachman* in fact proves it.[13]

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[10] The question in *Donovan* was whether insurance programs established by third parties were "plans" giving rise to fiduciary duties. An affirmative answer was finally arrived at—on re-argument, after the circuit decided to reverse the district court and previously controlling law in the circuit.

[11] "Not so well defined [as other statutory terms] are the first two pre-requisites: 'plan, fund, or program' and 'established or maintained.' Commentators and courts define 'plan, fund or program' by synonym . . . but do not specify the prerequisites of a 'plan, fund or program.'" *Donovan* v. *Dillingham,* 688 F.2d 1367, 1372 (11th Cir. 1982).

[12] " 'ERISA does not contain a clear definition of the word plan.' The definition of "employee welfare benefit plan' itself uses the word 'plan' . . . "). *Scott* v. *Gulf Oil Corp.,* 754 F.2d 1499 (9th Cir. 1985).

[13] Appellee mischaracterizes *Murphy* v. *Heppenstall Co.,* 635 F.2d 233 (3d Cir. 1980), *cert. denied,* 454 U.S. 1142 (1982). After

(footnote continued on following page)

For appellee to characterize the question of defining the terms upon which a lengthy, complex and comprehensive statutory/regulatory scheme is predicated as *insubstantial* is absurd. Even if there were little conflict among the federal authorities on the question, the conflict between the circuits and the states can not be ignored. *See* Appendix, reflecting distribution of states adopting appellants' position within the various federal circuits, attached hereto. Given the rampant confusion regarding the scope of the pre-empted field, *cf.* Appendices B and D to Appellant Gilbert's Jurisdictional Statement, the acknowledged difficulty of deciphering the terms most basic to ERISA, *see* text at pp. 6-7, *ante,* and the effect of continued uncertainty upon thousands, if not millions of workers, employers, courts, and administrative agencies, it is hard to imagine what constructive purpose could be served by prolonging the confusion.

C. *Review by Way of the Supreme Court's Appellate Jurisdiction Is Plainly Appropriate.*

The individual appellants herein claimed a right to severance pay by virtue of Section 198-c; the Commissioner intervened asserting that Burlington should be ordered to pay severance pay based on § 198-c, and Burlington moved to dismiss these claims on the ground that § 198-c was preempted by federal law. In response, both the district and circuit courts squarely held that § 198-c was pre-empted, and not merely that an exercise of authority without reference to any statute was invalid.

(footnote continued from previous page)

noting that ERISA only pre-empts state laws, the court goes on to conclude that there is no incompatibility between liability against a plan under ERISA and direct contractual liability against an employer. *Murphy, supra,* 635 F.2d at 237-39. Indeed, the opinion not only recognizes the distinction between plan liability and direct employer liability, it also recognizes the underlying distinction between *plans* and *employers. Id.* at 326-37.

As this Court acknowledged in *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), the paradigm of cases requiring review under 28 U.S.C. § 1254(2) is *Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978). Review by way of appeal rather than *certiorari* is proper in this case for the same reasons it was in *Malone*. A state statute, found to have been pre-empted by federal law, has been invalidated and its continued enforcement rendered unconstitutional because it was found repugnant to federal law under the Supremacy Clause. "It is uncontested that whether the . . . statute is invalid under the Supremacy Clause depends upon the [pre-emptive] intent of Congress." *Malone*, 435 U.S. at 504.[14]

In none of the cases relied upon by Burlington, unlike in these appeals, was the validity of a state statute either presented or decided by the courts. As this Court stated in *Silkwood*, the court of appeals "did not purport to rule on the constitutionality" of the Oklahoma statute. It "did not mention the statute, and the parties did not contest or defend the constitutionality of the statute in their briefs." *Id.*, —— U.S. at ——, 104 S.Ct. at 621.

Burlington's only remaining argument seems to be that Section 198-c is not invalidated because it may continue to be applied to claims for benefits other than severance pay. (*But see* Point B(1), *ante*). Since this Court has held that appellate jurisdiction is proper even where a state statute has been invalidated only as applied to the

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[14] *Accord, Local 926 Intern. Union of Oper. Engineers* v. *Jones*, 460 U.S. 669, 675 n.7 (1983), where, speaking of jurisdiction under 28 U.S.C. § 1257(2), this Court distinguished between appeals "as of right when a state statute is challenged . . . as being repugnant to the laws of the United States . . ." (*id.*) and appeals based upon rejection of common law causes of action. The appeal was dismissed and *certiorari* granted in *Local 926* once appellee abandoned the claim that the state court had relied upon a Georgia statute.

circumstances of a particular case, this argument is without merit.[15]

CONCLUSION

For the reasons stated, appellee's Motion to Dismiss or Affirm should be denied and the issues presented on appeal given plenary consideration.

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On behalf of the National Emergency
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[15] Furthermore, under the logic of the decisions of the courts below, virtually any employer agreement to provide benefits of a type enumerated in § 1002(1) is a "welfare benefit plan" within the meaning of ERISA. Thus, virtually every effort to enforce New York Labor Law § 198-c would be subject to injunction under ERISA's pre-emption provision, as would efforts to enforce the laws of the 35 other states that have joined as *amici* on these issues.

Source, West's Federal Reporter (St. Paul, Minnesota 1985)

Legend: shaded states are those which have joined in an amicus brief in support of appellants' position.

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Nos. 85-441 and 85-460

In the Supreme Court of the United States

OCTOBER TERM, 1985

LILLIAN ROBERTS, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK, APPELLANT

v.

BURLINGTON INDUSTRIES, INC.

IRVING GILBERT, ET AL., APPELLANTS

v.

BURLINGTON INDUSTRIES, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employer's policy of providing severance pay to eligible employees is an "employee welfare benefit plan" under ERISA, thus preempting state statutory and common law causes of action that relate to the severance pay policy.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-441

LILLIAN ROBERTS, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK, APPELLANT

v.

BURLINGTON INDUSTRIES, INC.

No. 85-460

IRVING GILBERT, ET AL., APPELLANTS

v.

BURLINGTON INDUSTRIES, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1982 Burlington Industries, a textile manufacturer, sold its sock and hosiery divisions as going concerns to Kayser-Roth Hosiery, Inc. Prior to the sale, Burlington arranged for the individual appellants, 36 former Burlington employees who worked in 16 different states but reported to Burlington's merchandising headquarters in New York, to continue working with the divisions following their acquisition by Kayser-Roth. All

of the individual appellants, except one who retired, continued to hold the same positions with Kayser-Roth that they previously held while employed by Burlington. J.S. App. A5.[1]

Burlington maintained a severance pay policy which was summarily described in an employee handbook and fully set forth in a company policy manual. The severance pay policy provided that "regular full-time salaried employees" experiencing either "job elimination" or certain other "involuntary terminations" were eligible for severance payments.[2] The grant or denial of severance pay occurred immediately upon termination of employment and benefits were payable from the company's general assets rather than from a separate fund. Burlington determined that appellants were not eligible for severance benefits under its policy because their jobs were not terminated. J.S. App. A5-A7.[3]

2. Burlington's former employees sought to obtain severance pay from the company on the theory that they became entitled to benefits when they ceased working for

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[1] The district court stated that appellants were employed by Kayser-Roth "at the salaries or rates of pay received previously from Burlington" (J.S. App. A22). The court of appeals, in contrast, noted that appellants contend that Kayser-Roth employed them at a lower rate of compensation (*id.* at A5).

[2] The policy states that "job elimination" includes "terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes" and that "other involuntary terminations" include "terminations due to unsatisfactory job performance which is not willful." J.S. App. A23. The amount of the severance payment is determined from tables contained in the policy and depends on factors such as age, salary, and years of service (*ibid.*).

[3] Burlington agreed to provide severance pay to any employee terminated by Kayser-Roth within six months after the sale (85-929 Pet. App. A11). Appellants contend that about one-third of them have been terminated by Kayser-Roth—presumably after the six-month period—and that Kayser-Roth has no severance pay policy, so that the terminated employees received little or no severance pay (85-460 J.S. 4 n.3).

Burlington and began working for Kayser-Roth. In state administrative proceedings, the New York State Commissioner of Labor ordered Burlington to comply with claims that ten of the individual appellants in this action had filed with the State Department of Labor pursuant to Section 198-c of the State Labor Law.[4] Burlington appealed the Commissioner's order to the New York State Industrial Board of Appeals. Appellants then brought this action in the United States District Court for the Southern District of New York, alleging four claims under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. II) 1001 *et seq.*, and, in the alternative, seven state law causes of action. The Commission intervened as a plaintiff, and the Board stayed enforcement of the Commissioner's order and held the administrative appeal in abeyance pending determination of the present action (J.S. App. A25).

Burlington sought dismissal of appellants' claims, contending that their state law claims are preempted by 29 U.S.C. 1144(a), which provides that ERISA "supersede[s] any and all State laws insofar as they * * * relate to any employee benefit plan." The district court dismissed the state law claims. It first held that Burlington's severance pay policy is an "employee welfare benefit plan" within the coverage of ERISA (J.S. App. A26). The court noted that Burlington did not contend that its severance pay policy was a *pension* plan but that it was a *welfare* plan as defined in 29 U.S.C. 1002(1).[5] Respond-

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[4] That statute makes it a misdemeanor for an employer to fail or refuse to pay or provide "benefits or wage supplements," which are defined by the statute to include "reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay." N.Y. Lab. Law § 198-c (McKinney 1986).

[5] Section 1002(1) defines "employee welfare benefit plan" (or "welfare plan") to mean "any plan, fund, or program * * * established or maintained * * * for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal

ing to appellants' argument that Burlington's severance pay policy is not a welfare plan "because there is no *plan* as such, but simply a naked promise to pay severance benefits" (J.S. App. A27 (emphasis in original)), the court, following *Donovan* v. *Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982) (en banc), concluded that Burlington's severance pay policy "is a plan, established by an employer, for the purpose of providing * * * [a covered] benefit to its participants, the Burlington employees, thruogh the use of general corporate assets" (J.S. App. A28). The district court also rejected appellants' arguments that welfare plans must be separately funded in order to be covered by ERISA (*id.* at A28, A30).[6] And the court concluded, contrary to appellants' contentions, that while the statute's fiduciary and reporting provisions establish responsibilities of plan fiduciaries and administrators, they do not set forth prerequisites for ERISA coverage (*id.* at A29).[7] The court added that an interpretive bulletin issued by the Department of Labor stated that welfare plans do not have to have a funding procedure and that a statement accompanying proposed amendments to ERISA regulations stated that "severance pay plans would in virtually all cases be welfare plans" (*id.* at A30, citing 29 C.F.R. 2509.75-5 (1980) and 44 Fed. Reg. 11763 (1979)).

Having determined that Burlington's severance pay policy is covered by ERISA, the court held that ERISA

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services, or (B) any benefit described in section 186(c) of this title * * *."

[6] In that connection, the court explained (J.S. App. A29) that although 29 U.S.C. 1002(1)(B) refers to benefits "described in" 29 U.S.C. 186(c), and that Section mentions "pooled * * * severance or similar benefits," that reference did not mean that severance pay benefits had to be pooled in order to be covered by Section 1002(1)(B). Appellants have abandoned this argument (see 85-460 J.S. 7-8 n.7).

[7] ERISA imposes certain uniform standards on the design, administration, and operation of all employee benefit plans, including rules concerning reporting, disclosure, and fiduciary responsibility. 29 U.S.C. (& Supp. II) 1021-1031, 1101-1114.

preempts appellants' state law claims because they "relate to" an employee benefit plan (J.S. App. A30-A31).[8] The court therefore dismissed the state law claims and permanently enjoined the state administrative proceedings; it did not dismiss appellants' ERISA claims. Pursuant to Fed. R. Civ. P. 54(b), the district court certified its decision for immediate review by the court of appeals. J.S. App. A34-A35.

3. The Second Circuit affirmed (J.S. App. A1-A20). The court agreed with the district court's conclusion "that Burlington's severance pay policy was an ERISA plan" (*id.* at A7). The court rejected appellants' argument that "a promise or agreement to pay severance benefits, without more," is not a welfare plan (*id.* at A9). The court instead found that the severance pay policy is a welfare plan under Section 1002(1)(A), which includes plans providing unemployment benefits in the definition of welfare plans, since severance pay is a type of unemployment benefit (J.S. App. A10). The court also concluded that the severance pay policy is a welfare plan under Section 1002(1)(B) which refers to severance pay by means of its reference to Section 186(c), which specifically mentions severance pay (J.S. App. A10). The court noted that a Department of Labor regulation states that welfare plans include plans that pay severance benefits (*id.* at A11, citing 29 C.F.R. 2510.3-1(a)(3)), concluding that that regulation is reasonable (J.S. App. A12).

The court also rejected appellants' argument that ERISA covers only separately funded severance pay plans (J.S. App. A11-A12). And it rejected their argument that Burlington's unfunded severance pay policy should be considered to be a "payroll practice" which is excluded from ERISA coverage under the Department of Labor's regulations (*id.* at A13).[9] As did the Ninth Cir-

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[8] Appellants have abandoned their argument that their state law claims do not "relate to" an ERISA plan. See 85-441 J.S. 7 n.**; 85-460 J.S. 7-8 n.7.

[9] To clarify the definition of "welfare plan," the regulation identifies as outside the scope of the definition certain "payroll practices" including arrangements whereby an employee continues to receive

cuit in *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503 (1985), the court noted that the payroll practices enumerated in 29 C.F.R. 2510.3-1 cover payments made "during the course of employment, while severance pay occurs only after termination" (J.S. App. A13).

The court accordingly held that ERISA preempts appellants' state common law claims and their claims based on N.Y. Lab. Law § 198-c (McKinney 1986). It stated that "[t]o hold otherwise would undermine the uniformity in plan administration that [ERISA] was designed to promote" (J.S. App. A17).[10]

Finally, the court of appeals considered whether Burington should be estopped from raising the preemption defense because, as appellants contend without contradiction, Burlington failed to comply with ERISA's reporting

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compensation from an employer's general assets during periods of absence. 29 C.F.R. 2510.3-1(b). Severance pay is not included among the "payroll practices" enumerated in the regulation.

[10] Two hundred other Burlington employees affected by the sale filed a similar action in the United States District Court for the Middle District of North Carolina, alleging claims based on ERISA and state law claims as well. As in this case, the employees first obtained a favorable administrative ruling from state officials. When federal court proceedings commenced, the Commissioner of Labor for the State of North Carolina intervened in that action. The district court held in that case that ERISA preempted the plaintiffs' state law claims. It also held that Burlington's decision to deny severance pay was not arbitrary or capricious and dismissed their ERISA-based claims. It based its conclusion that the employees could not recover under ERISA on its finding that "Burlington established its severance policy for the purpose of providing financial support to employees whose jobs are lost through no willful fault of their own and who might therefore be in need of financial resources during a period of unemployment" (85-929 Pet. App. A61). The Fourth Circuit affirmed (*id.* at A1-A43). It stated that because "unemployment compensation was undoubtedly a major purpose of the plan," Burlington's decision not to award severance pay, "though not compelled by the plan's language, is certainly a reasonable one" (*id.* at A38-A39). The individual plaintiffs in this related case have filed a petition for a writ of certiorari (No. 85-929) and the North Carolina Commissioner has filed a jurisdictional statement (No. 85-944), both of which are pending before the Court.

and disclosure requirements with respect to its severance pay policy until after suit was filed in this case. The court concluded that it would be undesirable to hold Burlington estopped and therefore subject to inconsistent treatment of claims under state law (J.S. App. A19). The court did not consider appellants' claims based on ERISA, leaving that question for determination by the district court on remand (*ibid.*).[11]

ARGUMENT

The court of appeals correctly determined that Burlington's severance pay policy is a welfare plan covered by ERISA. Therefore, the court was also correct in holding that appellants must seek relief under federal, not state, law. The decision below is consistent with the language and legislative history of ERISA and the contemporaneous construction of the statute by the United States Department of Labor, the agency charged with responsibility for enforcing the reporting, disclosure, and fiduciary obligations that ERISA imposes on private employee benefit plans. Moreover, the court of appeals' decision is in accord with the decisions of all other courts

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[11] Following the approach adopted in *Blau* v. *Del Monte Corp.*, 748 F.2d 1348, 1354 (9th Cir. 1984), cert. denied, No. 84-2009 (Oct. 7, 1985), the court concluded that it would be appropriate to scrutinize Burlington's decision not to award severance pay while at the same time indicating that the arbitrary and capricious standard of review should be applied in reviewing Burlington's construction of its severance pay policy. J.S. App. A18-A19. Such an approach, the court stated, "eliminates any incentive on the part of employers not to comply with the Act's reporting, disclosure and fiduciary requirements" (*id.* at A19). In following *Blau*, the court contrasted its approach with the approach taken by the district court in the case brought by Burlington employees in North Carolina (J.S. App. A18) since that court applied the arbitrary and capricious standard without considering Burlington's failure to comply with ERISA's reporting and disclosure provisions. The Fourth Circuit, in turn, which issued its decision after the Second Circuit, stated that it applied the arbitrary and capricious standard to all claim eligibility disputes and saw "no reason to vary the standard based on procedural violations indicating bad faith, for such situations can be adequately resolved under the traditional standard" (85-929 Pet. App. A37).

of appeals that have considered the issue, and does not conflict with any decision of this Court. Therefore, although in our view this case is properly brought as an appeal, it does not warrant plenary review.

1. This case is properly brought as an appeal pursuant to 28 U.S.C. 1254(2), which provides for review "[b]y appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States," because the court of appeals has held Section 198-c of New York's Labor Law unconstitutional under the Supremacy Clause. *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 515 n.7 (1984); *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 7 & n.6 (1983). Burlington argues that there is no basis for appeal because this case is similar to *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), in which the Court held that appeal was not proper where a court of appeals invalidated a punitive damages award because federal law prohibited such an award. The Court explained its decision in *Silkwood* by stating that the court of appeals "did not purport to rule on the constitutionality of the Oklahoma punitive damages statute. The court did not mention the statute, and the parties did not contest or defend the constitutionality of the statute in their appellate briefs. While the award itself was struck down, the statute authorizing such awards was left untouched." *Id.* at 247.

"Jurisdiction under 28 U.S.C. § 1254(2) is properly invoked only where a court of appeals *squarely* has 'held' that a state statute is unconstitutional on its face or as applied" (*Burger King Corp.* v. *Rudzewicz*, No. 83-2097 (May 20, 1985), slip op. 8 n.12 (emphasis in original)). This case falls in the Court's appellate jurisdiction under 28 U.S.C. 1254(2). Section 198-c of New York's Labor Law provides that it is a misdemeanor for an employer to refuse to pay benefits, including "separation * * * pay," and appellants seek to enforce that provision. Unlike *Silkwood*, the court of appeals expressly recognized that this case presents the issue whether Section 198-c is

preempted by ERISA (J.S. App. A8) and held that it is preempted (*id.* at A16). Thus, Section 198-c is not left "untouched," like the Oklahoma punitive damage awards statute in *Silkwood*. Rather the court of appeals has held that the statute may not be used to enforce promises by private employers to provide severance pay even though it applies by its terms in such cases. Since the court of appeals clearly held the statute unconstitutional as applied, this case is reviewable under Section 1254(2).[12]

2. Every court of appeals that has considered the question has concluded that an employer's unfunded severance pay policy is an employee welfare benefit plan covered by ERISA. In addition to the court below, the Fourth Circuit so held in the related case brought by other Burlington employees (see note 10, *supra*), and the Ninth Circuit has repeatedly held that unfunded severance pay policies are welfare plans. *Jung* v. *FMC Corp.*, 755 F.2d 708, 710 & n.2 (9th Cir. 1985); *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1502-1503 (9th Cir. 1985); *Blau* v. *Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1984), cert. denied, No. 84-2009 (Oct. 7, 1985).[13] Appellants have

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[12] Burlington's other arguments in support of its contention that this case does not present an appeal are insubstantial. Its argument (Mot. to Dis. or Aff. 8-9) that Section 198-c does not provide a private right of action appears to be wrong (see Appellants Jt. Br. in Opp. to Mot. to Dis. or Aff. 1-2) and is in any event irrelevant since the appellant in No. 85-441, the New York Commissioner of Labor, plainly has standing to enforce the law. Nor does it matter that appellants have abandoned the argument that their claims do not "relate to" ERISA. Although the issue presented is whether Burlington's severance pay policy is a welfare plan under ERISA, the parties agree that that question is significant because its answer determines whether Section 198-c is preempted.

[13] The Seventh and Eighth circuits, in ruling on ERISA claims involving severance pay provisions set forth in employer policy manuals, have implicitly held that informal, unfunded severance pay policies are covered by the statute. *Sly* v. *P.R. Mallory & Co.*, 712 F.2d 1209, 1210 & n.1 (7th Cir. 1983); *Dependahl* v. *Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), cert. denied, 454 U.S. 968 (1981), aff'g, 491 F. Supp. 1188, 1190, 1196 (E.D. Mo. 1980); see also *Sutton* v. *Weirton Steel Division of National Steel Corp.*, 724

cited no case that conflicts with the decision below, and we are not aware of any. Because severance pay policies, whether funded or unfunded, are welfare plans, appellants' state law claims are preempted by ERISA.

a. ERISA defines two categories of "employee benefit plans": employee welfare benefit plans and employee pension benefit plans. 29 U.S.C. 1002(3). Employee welfare benefit plan, the category relevant to this case, is defined as "any plan, fund, or program * * * established or maintained by an employer" for the purpose of providing specified benefits, including medical, disability, death, unemployment, and vacation benefits (29 U.S.C. 1002 (1) and (A)), and "any benefit described in section 186(c) of [Title 29]" (29 U.S.C. 1002(1)(B)). Section 186(c), enacted as part of the Taft-Hartley Act of 1947, enumerates the types of contributions an employer may legally make to a union trust fund, and includes contributions "paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, *severance* or similar benefits" (29 U.S.C. 186 (c)(6) (emphasis added)).

As this Court has several times observed, Congress intended ERISA to occupy the field of benefit plan regulation to the exclusion of the states in order to foster the development of such plans by relieving employers of potentially conflicting state requirements. See *Metropolitan Life Insurance Co.* v. *Massachusetts*, No. 84-325 (June 3, 1985), slip op. 13; *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 105 & n.25 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522-523, (1981). ERISA therefore preempts (with certain exceptions not applicable here, see 29 U.S.C. (& Supp. II) 1144(b)) "any and all State laws" that "relate to any employee benefit plan" as defined in the Act. 29 U.S.C. 1144(a).[14] If the Burlington

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F.2d 406, 409 (4th Cir. 1983), cert. denied, 467 U.S. 1205 (1984); *Pinto* v. *Zenith Radio Corp.*, 618 F.2d 110 (7th Cir. 1980) (Table), aff'g 480 F. Supp. 361 (N.D. Ill. 1979).

[14] Appellants did not raise, and the courts below did not consider the issue whether N.Y. Lab. Law § 198-c (McKinney 1986) is saved

severance pay policy is an "employee benefit plan" within the meaning of ERISA, the New York state law must be held to be preempted, because that law requires payment of separation benefits and thus clearly "relate[s] to" the company's policy.[15]

Appellants' primary contention is that Burlington's severance pay policy cannot be considered a "plan, fund, or program" within the meaning of ERISA's definition of "employee benefit plan." 85-460 J.S. 8-11; 85-441 J.S.

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from preemption by the exception in Section 514(b)(4) of ERISA for "any generally applicable criminal law of a State." 29 U.S.C. 1144(b)(4). The government agrees with other courts that have considered the question, however, that by limiting this exception to laws of "general" applicability, Congress expressed an intent to preempt state laws, such as Section 198-c, which are directed specifically at employee benefit plans. *Trustees of Sheet Metal Workers' International Association Production Workers' Welfare Fund* v. *Aberdeen Blower & Sheet Metal Workers, Inc.*, 559 F. Supp. 561, 563 (E.D. N.Y. 1983) (N.Y. Lab. Law § 198-c (McKinney 1986) is not a criminal law of general applicability); see also *Sforza* v. *Kenco Constructional Contracting, Inc.*, 629 F. Supp. 489, 491-492 (D. Conn. 1986) (and cases cited). Moreover, as one court has held, even if N.Y. Lab. Law § 198-c (McKinney 1986) were considered a generally applicable criminal law, ERISA's criminal law exception cannot be construed to save civil actions implied from state criminal statutes. See *Calhoon* v. *Bonnabel*, 560 F. Supp. 101, 109 (S.D.N.Y. 1982). But see, *e.g.*, *Goldstein* v. *Mangano*, 99 Misc.2d 523, 417 N.Y.S.2d 368 (Civ. Ct. 1978) (since Section 198-c is a generally applicable criminal law as defined by New York law, it is saved from ERISA preemption).

[15] While appellants do not argue that their state law claims do not relate to ERISA, state amici argue (Br. 16-17) that there is a conflict in the circuits on the issue of whether ERISA preempts related state law claims, citing *Carpenters Health & Welfare Fund* v. *Kenneth R. Ambrose, Inc.*, 727 F.2d 279 (3d Cir. 1983). The court in that case decided a pendent state law claim in an action to collect delinquent pension contributions under the terms of a collective bargaining agreement. *Id.* at 281. The Third Circuit rejected without discussion the employer's argument that ERISA preempted the state law claim. *Id.* at 282 n.5. In the absence of any indication from the Third Circuit as to the basis of its holding, the decision in that case cannot be read as creating a conflict with cases holding, as Section 1144 plainly commands, that state law claims related to ERISA are preempted.

10-13. They argue that the court of appeals simply did not consider the threshold issue of the existence of a plan, and indeed that "[t]here is not a single case, nor a single court, that has truly addressed [this] issue" (85-460 J.S. 11). These contentions are simply incorrect. In *Donovan* v. *Dillingham*, 688 F.2d 1367 (1982) (en banc), the leading case construing the term "plan" for purposes of applying ERISA's definitions and coverage provisions, the Eleventh Circuit squarely addressed the question of what constitutes the establishment of a plan under ERISA. The court concluded that "a 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits" (*id.* at 1373). The *Dillingham* formulation gives a common sense meaning to the statutory language which connotes an identifiable benefit policy without specifying what form that policy must take. The district court in this case expressly followed *Dillingham* (J.S. App. A27-A28) and the court of appeals affirmed, noting its approval of the district court's "well-considered opinion * * * that Burlington's severance pay policy was an ERISA plan" (*id.* at A7). The standards articulated in *Dillingham* also have been followed uniformly by all the courts of appeals that have considered the question of whether an employer's benefit policy constitutes an ERISA plan. *Scott*, 754 F.2d at 1503-1504; *Blau*, 748 F.2d at 1352; see also *Dependahl*, 491 F. Supp. at 1195.

Contrary to the contentions of appellants and state amici (85-460 J.S. 17; States Amici Br. 13) nothing in the language or structure of ERISA suggests that in order to meet the definition of "employee welfare benefit plan" a severance pay policy must be funded. The statute's definitional and coverage provisions contain no funding requirements or limitations. See 29 U.S.C. 1002(1) and 1003(a). Had Congress intended to limit coverage of the Act to separately funded plans it could have so stated. Instead, Congress defined "welfare plan" broadly to include not just any "fund," but any "plan, fund or

program" that provides covered benefits. 29 U.S.C. 1002(1). Moreover, in defining the statute's pattern of regulation, Congress repeatedly distinguished between funded and unfunded plans. For example, the statute's requirement that plan fiduciaries be bonded expressly does not apply "where such plan is one under which the only assets from which benefits are paid are the general assets of a union or of an employer." 29 U.S.C. 1112(a)(1). Obviously such an exemption would be superfluous if Congress had defined employee welfare benefit plans to include only benefit plans that have a separate source of funding. Welfare plans also are exempted altogether from ERISA's specific funding requirements. 29 U.S.C. 1081(a)(1).[16] These provisions amply demonstrate that Congress intended ERISA to regulate welfare plans irrespective of their method of financing.

The Department of Labor has consistently interpreted the definition of "welfare plan" to include unfunded severance pay plans. The Department published regulations less than a year after the Act's passage construing ERISA's coverage provisions. 29 C.F.R. Pt. 2510. The regulations clarify that severance pay plans generally are categorized as "welfare plans" rather than "pension plans" and thus are not subject to the funding and other requirements that ERISA imposes on pension plans. 29 C.F.R. 2510.3-2(b). And, in advisory opinions interpreting the Act, the Department has consistently found that unfunded severance plans are governed by ERISA. See, *e.g.*, Advisory Op. 81-55A (June 26, 1981); Advisory Op. 76-66 (June 2, 1976). This longstanding interpretation of the Act by the agency charged with its administration is entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984); see also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

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[16] See also, *e.g.*, 29 U.S.C. 1051(2), 1081(a)(3), 1101(a)(1) (excepting unfunded deferred compensation plans from the Act's participation and vesting, funding, and fiduciary responsibility provisions).

In 1980 Congress ratified the Department's interpretation by amending 29 U.S.C. 1002(2) expressly to authorize the Department to treat severance pay arrangements as welfare plans. The amendment provided that "[t]he Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which—(1) severance pay arrangements * * * shall, for purposes of this title, be treated as welfare plans rather than pension plans" (Pub. L. No. 96-364, § 409, 94 Stat. 1307). See also, 126 Cong. Rec. 20208 (1980) (joint explanation of amendments). Thus Congress, by adopting this amendment after the Department had promulgated its regulations, effectively approved the Department's interpretation of the Act to cover unfunded severance pay plans, as the Fourth Circuit recognized in the related case arising from Burlington's sale of its sock and hosiery divisions to Kayser-Roth (85-929 Pet. App. A21-A22). That court and the Ninth Circuit have expressly rejected arguments, similar to those raised by appellants here, that a severance pay plan must be funded in order to be covered by the Act. *Scott*, 754 F.2d at 1503.

The Department's regulations also clarify that although the definition of "welfare plan" refers to "any benefit described in [29 U.S.C.] 186(c)" which in turn lists "*pooled* severance [and other] benefits" (emphasis added), this language does not indicate that severance benefits must be funded separate from the general assets of the employer in order to be covered by ERISA. 29 C.F.R. 2510.3-1(a)(3). As analyzed by the regulations, "the effect of [the cross-reference] is to include within the definition of 'welfare plan' those plans which provide * * * severance benefits, and benefits which are similar" (*ibid.*). This conclusion is quite clearly correct. The word "pooled" is used in Section 186(c) in the context of "money * * * paid by any employer to a trust fund established by such representative," meaning money paid to a fund set up by a union or other employee representative. Thus if the reference to Section 186(c) were taken to encompass not just the type of benefit but also

the arrangement for payment of benefits described in Section 186(c), ERISA's coverage would be limited not just to funded severance benefit plans but to "pooled" severance benefit plans set up by a union or some other entity separate from the employer. Thus the argument that the reference to Section 186(c) requires severance plans to be funded or "pooled" in order to be covered by ERISA proves too much. Indeed appellants have abandoned this argument.[17]

b. Appellants argue (85-441 J.S. 16-18) that Burlington's severance pay policy is a "payroll practice" that is excluded from ERISA's definition of "employee welfare benefit plan" by the Department of Labor's regulations. This argument is incorrect. The court of appeals here (J.S. App. A13) and the other courts of appeals that have considered the issue uniformly and correctly have held that the payment of severance benefits from general assets does not constitute a "payroll practice" under 29 C.F.R. 2510.3-1(b). 85-929 Pet. App. A22-A24; *Scott*, 754 F.2d at 1502-1503. As we have shown, the Department of Labor has consistently interpreted ERISA to cover unfunded severance pay plans. The same regulations that specifically interpret the definition of "welfare plan" to include severance pay plans, 29 C.F.R. 2510.3-1(a)(3), make no mention of severance pay in the immediately following provision identifying payroll practices that are excluded from that definition. 29 C.F.R. 2510.3-1(b).[18] These provisions must be construed to-

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[17] As noted above (see note 6, *supra*), appellants have abandoned any argument based on Section 186(c)'s reference to "pooled" severance benefits. Rather, they argue here that as a general matter Congress sought only to regulate those welfare plans that are constituted as a separate entity. But, as we understand their argument, this is merely another way of saying that ERISA only covers plans that are separately funded. The appellant in the related case argues that an ERISA plan must have a separate identity (85-944 J.S. 14-19) and that the plan must be funded (*id.* at 20-23).

[18] The "payroll practices" regulation identifies payroll and other practices that do *not* constitute welfare plans. 29 C.F.R. 2510.3-

gether in order to give effect to each, and one provision should not be construed so as to negate the other. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949). Under appellants' reading of the regulations, however, the "payroll practices" exception would largely nullify the effect of the preceding provisions construing "welfare plan" by excluding from coverage all unfunded severance benefit plans.

Appellants acknowledge that the regulations do not expressly identify severance benefits as a payroll practice. They contend, however, that there is "no logical basis" for treating severance benefits differently than sick leave and holiday and vacation pay, types of benefits that are excluded from coverage by the payroll practice regulation when paid from an employer's general assets (85-441 J.S. 17-18). Their argument misapprehends both the purpose and the effect of the Department's regulations.

Congress did not intend to make ERISA a vehicle for regulating ordinary wage practices. Rather Congress sought in ERISA to regulate the wide variety of fringe benefit programs that had developed as "a means of compensating workers in lieu of increased wages" as a result of wage freezes imposed during World War II and the Korean conflict. S. Rep. 93-127, 93d Cong., 1st Sess. 3 (1973); see H.R. Rep. 93-533, 93d Cong., 1st Sess. 2-4 (1973). The Department's purpose in exempting payroll practices is to give effect to the fundamental distinction Congress recognized between wages (and similar types of compensation), which Congress did not intend ERISA to regulate, and fringe benefit compensation, which Congress sought to bring under federal control. Severance benefits,

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1(a)(1). The "payroll practices" enumerated in the regulation include standard forms of employee compensation, such as overtime pay and shift, holiday or weekend premiums (29 C.F.R. 2510.3-1(b)(1)), and various paid leave arrangements, such as sick leave, holidays, and vacations, whereby an employee continues to receive compensation out of the employer's general assets during periods of absence (29 C.F.R. 2510.3-1(b)(2) and (3)).

unlike vacation pay, holiday pay, and sick leave, are invariably paid after or at the time the employee leaves employment. Thus severance benefits are more like unemployment benefits (a type of fringe benefit also listed in the Section 1002 definition of welfare plans) than like wages for days an employee would otherwise be working but for the employer's willingness to excuse him for vacation or sickness. As the Ninth Circuit aptly observed in *Scott*, in contrast to severance benefits, "[t]he practices described in the [payroll practices] regulations require disbursements of funds easily analogized to ordinary wages, and the payments involved invariably take place during the term of employment" (754 F.2d at 1503).

Congress had two broad concerns in enacting ERISA: failure to pay promised fringe benefits to employees, and mismanagement of funds accumulated to finance employee benefits. The Department's regulations exclude from coverage unfunded plans providing vacation and holiday pay and sick leave because, unlike severance benefits, such payments are like ordinary wages and do not reflect either of Congress's concerns. See *California Hospital Ass'n* v. *Henning*, 770 F.2d 856 (9th Cir. 1985), petition for cert. pending, No. 85-1648. The regulations do include within ERISA's coverage plans establishing trust funds for payment of vacation and holiday pay and sick leave; but they do so not because welfare plans must be funded in order to be covered by ERISA, but rather because such trust funds raise the second of Congress's concerns, avoiding mismanagement of benefit funds. Therefore the Labor Department's regulations provide no basis for concluding that severance payments are not employee welfare benefit plans within the meaning of ERISA.

c. Appellants and state amici argue (85-460 J.S. 17 & n.15; States Amici Br. 12, 14) that to be covered by ERISA, welfare plans must have certain "basic features" suggested by the statutory requirements for covered pension plans. Another way of stating this argument is that an employer should not be able to rely on ERISA's preemption provision if the employer has not complied with

ERISA's reporting, disclosure, and fiduciary requirements. But whichever way one states the argument, it has no support in the statute; indeed it stands the statute on its head.

As the district court stated (J.S. App. A28), "[t]he existence of a 'plan' under ERISA is to be determined solely by an examination of the Act's 'coverage' and 'definitional' sections." The ERISA provisions that state "the responsibilities of fiduciaries and administrators of plans covered by ERISA * * * do *not* set forth prerequisites for ERISA coverage" (J.S. App. A29 (emphasis in original)). In other words, if an employer's benefit policy meets the definition of employee welfare benefit plan set forth in ERISA, then the employer must comply with ERISA's reporting, disclosure, and other requirements. He cannot exempt himself from ERISA by refusing to comply with the statute. The Eleventh Circuit has recognized the obvious incongruity of permitting persons who establish or maintain informal or unwritten plans to circumvent the Act merely because an administrator failed to satisfy applicable reporting or fiduciary standards (*Dillingham*, 688 F.2d at 1372). And appellants have not been able to point to anything in the statute or legislative history suggesting that an exception to ERISA's preemption provision should be created as a sort of remedy for noncompliance with ERISA. To the contrary, the remedies for noncompliance are expressly set forth in the statute itself. Section 1132(a) of Title 29 provides injunctive remedies to compel compliance with ERISA, and Section 1131 provides criminal penalties for willful violation of the reporting and disclosure requirements for employee welfare benefit plans.

d. Appellants and state amici argue (85-460 J.S. 10-11; States Amici Br. 5) that Congress could not have intended ERISA to cover, and therefore preempt, state regulation of unfunded severance pay plans because to do so would upset the traditional balance of federal-state regulation in the labor relations field as recognized by this Court in cases such as *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 289 (1971). However, cases

construing the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, and other federal statutes governing labor-management relations are irrelevant to the question of whether ERISA preempts state laws that relate to covered employee benefit plans. As this Court recently noted, "[u]nlike ERISA, the NLRA contains no statutory preemption provision," and "there is no suggestion in the legislative history of the [NLRA] that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization." *Metropolitan Life Insurance Co.*, slip op. 22, 30.

ERISA, unlike the NLRA, explicitly sets forth an expansive preemption command, the legislative history of the Act confirms Congress's intent to occupy the field of employee benefit plan regulation, and this Court has interpreted the operative statutory phrase, "relate to any employee benefit plan," in a broad, literal fashion. *Shaw*, 463 U.S. at 95-100. Moreover, contrary to appellants' and state amici's assertions, the court of appeals' holding does not federalize the entire area of state wage regulation. Rather, it merely precludes state regulation of those specialized forms of compensation covered by ERISA. Nothing in ERISA precludes the states from continuing to regulate routine wage or salary arrangements, or other practices described in the payroll practices regulation.[19]

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[19] Relying on this Court's decision in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980), appellants (85-441 J.S. 15) and state amici (Br. 15-16) argue that the decision below, by precluding state law claims of entitlement to severance benefits, improperly limits a participant's remedies for alleged denial of benefits to an ERISA action to enforce the plan's liability while foreclosing an action to enforce an employer's liability under the plan. This argument is without merit. ERISA plainly authorizes plan participants "to enforce * * * the terms of the plan" against any proper defendant from whom relief is available. 29 U.S.C. 1132(a). As appellants recognize, implicit in *Nachman* is the recognition that ERISA authorizes causes of action against an employer as well as against a plan. However, as the court below

To permit state law actions for recovery of benefits under an employee benefit plan would run afoul of ERISA's preemption provision because it would subject ERISA plans and fiduciaries to potentially conflicting benefit liabilities and varying requirements for plan administration depending on the state in which an action was brought.[20] With respect to the single plan at issue in this case, for example, Burlington could be subject to differing duties and responsibilities and liable for different benefits in as many as 16 different states. Congress preempted state laws in ERISA precisely to free plans and their administrators from such inconsistent and varying legal requirements. A participant's or beneficiary's right to benefits under a plan, therefore, must be enforced, if at all, pursuant to ERISA.[21]

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pointed out, "*Nachman* and its progeny were based on federal rather than state law" (J.S. App. A16). The Court in *Nachman* did not address, nor did it have occasion to consider, questions concerning ERISA preemption of state law actions premised on an employer's liability under an unfunded welfare benefit plan. While ERISA preempts state law claims, it expressly provides that it does not "alter, amend, modify, invalidate, impair, or supersede any law of the United States" (29 U.S.C. 1144(d)). Therefore, the fact that an employer is subject to a federal law claim that relates to ERISA does not mean that an employer is subject to a state law claim relating to ERISA. For this reason, state amici's reliance (Br. 17-19) on *Murphy* v. *Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), cert. denied, 454 U.S. 1142 (1982), is similarly misplaced, since the court there acknowledged that "[t]he employees' contract claim against the employer is not a state law claim" (635 F.2d at 237).

[20] The legislative history of the Act demonstrates that Congress intended contract claims involving ERISA plans to be determined under federal common law. Thus, the sponsors of the Act envisioned that the federal courts would develop "a body of Federal substantive law * * * to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits). See also H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 327 (1974); 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams).

[21] Contrary to state amici's claims (see, *e.g.*, States Amici Br. 4-6), participants and beneficiaries are not powerless to enforce ERISA. They are expressly authorized to bring suit by 29 U.S.C.

Appellants and state amici advert to the irony that, while intending to protect the interests of plan participants and beneficiaries, Congress, by constituting employee benefit plans as exclusively a federal concern, has preempted state statutes that may in some situations provide greater protections than those afforded by the federal statute. But, as we have shown, Congress plainly intended ERISA to cover severance pay plans and consciously preempted all state laws that relate to covered plans in order to provide a favorable environment for the growth of such plans. As the Fourth Circuit concluded in the related case brought by other former Burlington employees, "[t]he fact that employees may sometimes wish to forego [the] advantages of ERISA coverage in favor of arguably more generous state statute[s] does not allow us to escape the clear direction of Congress") 85-929 Pet. App. A24-A25).[22]

1132(a) and may obtain attorney's fees in appropriate cases under 29 U.S.C. 1132(g).

[22] The former Burlington employees who brought suit in North Carolina contend in their petition for a writ of certiorari (85-929 Pet. 24-28) that the courts of appeals have created varying legal rules under ERISA to construe severance pay provisions, and that review by this Court is warranted for that reason. As we have noted (see note 11, *supra*), the Second Circuit in this case decided that Burlington's construction of its severance pay policy ought to be scrutinized because of its failure to comply with ERISA's reporting and disclosure provisions, while the Fourth Circuit in the related case determined that Burlington's construction of its policy is not arbitrary and capricious. The Ninth Circuit has stated that "less deference" is due an employer's construction in circumstances such as those presented here. *Jung*, 755 F.2d at 712. While there are differences in the language used by the courts, as petitioners note, each court purports to apply the arbitrary and capricious standard. It is not clear whether any differences in result will occur, since the Second Circuit has not rejected Burlington's construction of its severance pay provision but instead left that issue for initial determination by the district court. In our view, the question of the appropriate standard of review to apply in cases involving the construction of terms in unfunded welfare plans would benefit from further development by the lower federal courts. If the Court disagrees, it should grant the petition in No. 85-929, limited to Questions 1 and 2.

CONCLUSION

The judgment of the court of appeals should be affirmed. If the Court concludes that an appeal is improper, and treats the jurisdictional statements as petitions for a writ of certiorari pursuant to 28 U.S.C. 2103, the petitions should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRVING GILBERT, *et al.*, and
LILLIAN ROBERTS, as Commissioner of Labor
of the State of New York,

Appellants,

—against—

BURLINGTON INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT SUPPLEMENTAL BRIEF OF APPELLANTS IN RESPONSE TO BRIEF OF UNITED STATES

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THE SOLICITOR GENERAL HAS NEITHER RESOLVED NOR MINIMIZED THE NEED TO RESOLVE THE QUESTIONS RAISED BY APPELLANTS

Introduction

The brief submitted by the United States as amicus curiae in response to the *Gilbert* and *Roberts* appeals does not resolve the issues raised by appellants or clarify the state of the law.[1] Indeed, the arguments it addresses are not the arguments appellants have raised; they are not even arguments to which appellants subscribe.

I.

The Question Presented by Appellants: What Is a Plan?

The United States mistakenly assumes that the question that appellants have posed is whether "ERISA only covers plans that are separately funded." (SG at 4, 15 n. 17). *That is not the question.*[2] The question is not

[1] The Brief of the United States as Amicus Curiae shall hereinafter be referred to as "SG".

[2] Indeed, appellants never made this argument. To the contrary, appellants argued to both the district and circuit courts in this case that the difference between subparagraphs (A) and (B) of § 1002(1) was that the former covered unfunded plans and the latter, funded plans—thereby recognizing that the Act covers both.

Since appellants are not pressing this distinction on appeal and are *not* arguing that severance plans must be funded in order to be covered by the Act, see 85-460 J.S. at 7-8 n.7, the portion of the Solicitor General's brief which addresses this contention is totally besides the point. (This constitutes fully 60% of the Solicitor General's argument; *see* SG at 9-15 and 18-21).

Appellants are posing a much more fundamental question: what is a *plan?* And, what does it mean for one to be *established* within the meaning of the Act?

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whether a plan must be funded in order to be considered a covered welfare plan, but what a plan *is* in the first place. To this question, the United States has no answer.[3]

II.

Congress Answers the Question.

The term "plan" has two different, but related senses as used in the Act.[4] In some instances, it clearly refers to an entity from which employees are entitled to receive benefits. In this sense a "plan" is an entity like a trust,

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While the creation of a fund may provide evidence of a plan's having been established, it is neither a *sine qua non* of the plan's existence nor a prerequisite to its establishment. Simply put, a welfare plan may be funded, underfunded or *un*funded; what matters is not the level at which it is or is not funded, but its *existence*. That alone is determinative of ERISA jurisdiction and federal pre-emption. *See* n. 20, *post*.

[3] To the extent that it may be said to address this question at all, all it does is rely upon a series of tautologies to the effect that a 'plan is a plan is a welfare plan.' *See, e.g.*, SG at 4 ("severance pay *plans* would in virtually all cases be welfare plans"); SG at 5 ("welfare plans include *plans* that pay severance benefits"); SG at 21 ("as we have shown, Congress plainly intended ERISA to cover severance pay *plans*").

Appellants agree: ERISA covers both severance pay plans and other types of *plans*. The question, however, is—are there any benefit policies or practices that are *not* plans and, therefore, *not* covered by ERISA. Appellants are certain there are: *e.g.*, an employer's naked promise, without more, to pay any type of welfare benefit; an employer's personnel policy or compensation practice; the provisions of an employee handbook, etc. . . .

The United States does not discuss this question. It simply *assumes* that because the Act covers unfunded plans, it also covers employer personnel policies. As will hereinafter be seen, the two *cannot* be equated. An employer compensation or personnel policy is not a "plan."

[4] The term "plan" as used throughout the Act is synonymous with the phrase "plan, fund, or program" as that phrase is used in 29 U.S.C. §§ 1002(1) and 1002(2)(A). *See* 29 U.S.C. § 1002(3), and then §§ 1002(1) and 1002(2)(A).

which, although it may have no assets, has a clearly defined structure and an existence separate from both its trustees and beneficiaries.[5] In other instances, the word "plan" refers to the instrument which governs the operation of that entity and spells out the relationship between the entity and its participants. In this sense, a "plan" is like a trust agreement or indenture under the terms of which trustees and beneficiaries are given rights and obligations.[6]

There can be no mistaking the fact that "plans" have a dual aspect to them because, on the one hand, the Act clearly contemplates that a plan will be able to:

—employ persons, *see* §§ 1023(c)(3) and 1002(14),

—own property or other assets, *see* §§ 1023(b)(3) and 1002(21)(a),

—receive contributions, *see* § 1002(37)(A)(i),

—receive other financing, *see* § 1022(b),

—maintain books and records, *see* §§ 1022(b) and 1023(a)(3)(A),

—file annual reports, statements of assets and liabilities and financial returns, *see* §§ 1023(a)(4)(A) and 1023(b)(4),

—be a party to various transactions, *see* § 1023(b)(3)(H), and

—sue or be sued, *see* §§ 1132(d)(1) and 1002(19).

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[5] Appellants do not contend that the entity must in fact be a trust. Indeed, appellants assume the contrary, i.e., that ERISA covers many entities which, although trust-*like*, have not been so established as to meet the technical requirements for the establishment of a trust under state law.

Indeed, it was *precisely* because employees were unable to employ the common law of trusts to recover benefits from their plans that ERISA was enacted in the first place. The statute provided a remedy where none had existed before.

[6] Similarly, appellants do not contend that the instrument must actually be a trust agreement. *See* n. 5, *ante*.

On the other hand, the Act just as clearly contemplates that a plan will have terms under which a participant or beneficiary will be able to "recover benefits," "enforce rights," and "clarify . . . rights to future benefits."[7] 29 U.S.C. § 1132(a)(1)(B).

Therefore, in order for a plan to have been established or be maintained within the meaning of the Act, there must be both an entity from which, and instrument under which, participants can recover benefits.[8]

The entity and instrument that the Act contemplates are not just *any* entity and *any* instrument, however. The Act contemplates an entity which has a structure and identity separate from that of its sponsor, and an instrument which governs the operation of the entity and its relationship to third paries.

1. *A Plan Is an Entity Separate From the Employer.*

At a minimum, the Act contemplates that in order for an employee benefit plan to be established or maintained, it must have an identity, practically and juridically speaking, separate from that of an employer which establishes it.[9] A separate identity is the *sine qua non* of the plan's

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[7] *See, e.g.*, 29 U.S.C. §§ 1002(8), 1002(14)(C), 1002(14)(D), 1002(19), 1002(22), 1002(24)(A), 1002(37)(A)(iii), 1022(a)(1) and (2), 1022(b), 1023(a)(2)(A), 1023(b)(1), 1023(c), wherein the Act contemplates that a plan will contain certain provisions, describe certain procedures, define certain rights and obligations, etc.

[8] In the case of a welfare plan, there must be an entity from which, and instrument under which, participants can recover the benefits enumerated in § 1002(1)(A) or "described in § 302(c);" in the case of a pension plan, there must be an entity from which, and instrument under which, participants can recover pension benefits.

[9] *See, e.g., Wayne Chemical, Inc.* v. *Columbus Agency Service Corp.*, 567 F.2d 692, 699 (7th Cir. 1977); *Taggart Corp.* v. *Life & Health Benefits Administration, Inc.*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Hamberlin* v. *VIP Insurance Trust*, 434 F.Supp. 1196 (D.Ariz. 1977).

existence. Even the most cursory examination of the Act supports this thesis.

The Act not only assumes that a plan is an entity, but that employers, participants and beneficiaries exist in relation to it. Compare, in this regard, the statutory definitions of the terms, "employer" and "participant":

> "(5) (t)he term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, *in relation to an employee benefit plan . . .*"
>
> * * *
>
> "(7) The term "participant" means any employee or former employee of an employer, . . . who is or may become eligible to receive a benefit of any type *from an employee benefit plan* which covers employees of such employer . . ."

29 U.S.C. §§ 1002(5) and (7) (emphasis added). These definitions only make sense if a plan has a structure separate from that of its sponsor.

Even clearer in this regard are sections 1132(d)(2), 1106(a) and 1107 of the Act. Section 1132(d)(2) provides that a money judgment against a plan shall be enforceable only against the plan and not against the employer that established it,[10] and §§ 1106(a) and 1107 prohibit transactions *between* a plan and its sponsoring employer. The provisions, therefore, presume the separateness of the employer and plan.[11]

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[10] 29 U.S.C. § 1132(d)(2) provides that "[a]ny money judgment . . . against an employee benefit plan shall be enforceable *only* against the plan as an entity and shall not be enforceable against any other person . . .". (Emphasis supplied). The term person is defined in § 1002(9): it includes a corporate employer. The United States has either overlooked or mistaken the meaning of these provisions, *see* SG at 19 n. 19.

[11] Appellants do not contend, as the district court below assumed they did and as the United States still assumes, that

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2. *A Plan Is Also the Instrument Which Governs That Entity.*

In addition to being an entity with a distinct *persona,* a plan is also the instrument which defines and governs the relationship between that entity and its participants. This is necessarily so since it is *under the terms of their plan* that participants and beneficiaries are entitled to recover benefits from the *plan entity,* and enforce rights against it. *See* 29 U.S.C. §§ 1002(7), 1002(8), 1132(a), 1132(d)(1), 1132(d)(2) and 1002(9). Thus, every "plan" must have a "plan" or plan instrument.[12]

3. *A Simple Employment Contract Is Not a Plan Within the Meaning of the Act.*

It follows from our two initial theses that there is a basic but meaningful distinction between a simple personnel policy or employment contract, on the one hand, and a "welfare plan," on the other. The first sets forth rights and obligations which inhere between employer and employee. The second sets forth rights and obligations which inhere between a plan and its participants. ERISA governs only the plan-participant relationship and not the employer-employee relationship.

Thus, where a document, policy or agreement creates only rights and obligations between an employer in his capacity as an employer and his employees *qua* employees, it does not constitute an "employee benefit plan" or "plan" within the meaning of the Act.

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Burlington cannot be said to have established or maintained a "plan" within the meaning of the Act because it didn't comply with the statute's fiduciary, disclosure and reporting requirements. (A-29 and SG at 17-18). On the contrary, appellants contend that Burlington cannot be said to have established or maintained a "plan" because it never created an entity or institution *capable* of complying with those provisions.

[12] To be a plan instrument, a document must establish an entity separate from the employer as the mechanism through which benefits are provided.

It necessarily follows that any laws which are invoked to enforce rights and obligation under and in accordance with such a document are not pre-empted by ERISA. This is so because the liability being asserted is neither *against* any plan nor under the *terms* of any plan. As applied, therefore, such laws do not relate "to any employee benefit plan." [13]

Nachman Corp. v. *Pension Benefit Guaranty Corp.* and *Murphy* v. *Heppenstall* recognize these three basic, but critical, distinctions, i.e.: the distinction between plans and employers, between plan instruments and employer personnel policies or employment contracts, and between plan liability and an employer's direct contractual liability. (*See* 85-441 J.S. at 10-15; 85-460 J.S. at 18-23; Jt. Brief in Opp. to Motion to Dismiss or Affirm at 7-8). *Donovan* v. *Dillingham,* 688 F.2d 1367 (11th Cir. 1982), on the other hand, upon which the United States relies, does *not* recognize these distinctions.[14] It had no occasion to.[15]

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[13] *See* 29 U.S.C. § 1144(a). It is significant to note that this is true, and that there is no pre-emption, whether the causes of action that the employee asserts are asserted under federal law, state law, common law or statutory law. Thus, the fact that the contract claims that were involved in *Nachman* and *Murphy* were *federal* instead of state law claims is irrelevant to the issues before this Court. (*See* S.G. at 20 n. 19, wherein the Solicitor General argues to the contrary.)

[14] It is interesting to note that in the brief the Secretary of Labor submitted to the Ninth Circuit in the *Henning* case, the Secretary criticized the district court for having "followed an irrelevant tack when it applied the definition of [the terms "plan, fund or program"] developed in *Donovan* v. *Dillingham* . . ." According to the Secretary, "*Dillingham* did not reach the central question" of whether the vacation pay arrangement involved in *Henning* was an employee welfare benefit plan. (Brief of Secretary of Labor as Amicus Curiae, *Calif. Hosp. Ass'n* v. *Henning,* 770 F.2d 856 (9th Cir. 1985), at 33 n. 24).

[15] The question presented in *Donovan, supra,* was whether the trustees of a multi-employer insurance trust, which purchased group health insurance for subscribing members at rates more

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Thus, it is to *Nachman* and *Murphy,* and not to *Donovan* v. *Dillingham,* that the Court should look when considering the questions presented by this appeal.

III.

The United States Department of Labor's Answer Is Not an Answer.

While the Department of Labor attempted in its "payroll practices" regulation to develop a coherent response to the many questions that have arisen regarding ERISA's coverage, the benefit-by-benefit approach which it adopted to resolve these questions is neither workable nor consistent with the statute.

The approach is inconsistent with the statutory scheme and underlying legislative intent because ERISA is not a statute about *types* of benefits, but about regulating specific *methods of providing benefits.*[16] To the extent the Department's regulations read the term "plan" out of the Act, therefore, and make ERISA coverage turn solely on the type of benefits employees are being offered, the regulations have the effect of amending the statute, not implementing it.

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favorable than those offered directly by insurers, were subject to the provisions of ERISA regarding fiduciary duties. The court was not faced with determining whether a simple personnel policy or promise of benefits was a "plan" within the meaning of the Act and, therefore, had no occasion to consider the questions, and make the distinctions, raised by appellants.

[16] Those who argue for determining ERISA's coverage by comparing the benefit being provided in any given instance with the list of benefits set forth in § 1002(1) do so on the assumption that Congress has federalized the entire field of employee benefits. (This will hereinafter be referred to as the "benefits approach".) Those who argue for or apply a structural approach, as appellants have, do so on the assumption that there has been a functional division of authority—in which federal law governs employee benefit plans and state law, an employer's direct contractual liability. (*See* 85-460 J.S. at p. 24, ¶ 6 and App. E, Models A and B, appended to 85-460 J.S.).

The Department's benefit-by-benefit approach is also unworkable because it leads to the type of inconsistent results exemplified by the decisions in *California Hospital Ass'n* v. *Henning,* 770 F.2d 856 (9th Cir. 1985), *pet. for cert. filed,* Doc. 85-1648 (1986), and *Gilbert* v. *Burlington Industries, Inc.,* 756 F.2d 320 (2d Cir. 1985), *separate appeals filed,* Doc. Nos. 85-441 and 85-460 (1985). Both cases involve benefits covered by 29 U.S.C. § 1002(1),[17] and employer promises to provide these benefits through mechanically implemented payroll practices. Yet, the policies in *Gilbert* were held to be ERISA-covered "employee welfare benefit plans", while the policies in *Henning* were not.[18]

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[17] *Henning* involves accrued vacation benefits, and *Gilbert* involves payroll and vacation severance benefits. The benefits are indistinguishable: both are payable only upon termination of employment. Both are "covered benefits" under section 1002(1).

[18] Had a strict "benefits approach" been applied, the results in the two cases would have been the same. That is, the courts would have found that the policies involved in both cases were "employee welfare benefit plans" since the benefits being provided are both benefits enumerated in § 1002(1).

The results would *also* have been consistent had the structural approach appellants have argued for been applied. Under this approach, however, the courts would have found that *neither* case involved an "employee welfare benefit plan" because the policies under which the benefits were promised are *not plans* within the meaning of the Act.

The fact that a split-decision was rendered results from the fact that the United States Department of Labor has adopted a modified form of "benefits approach." Under this approach, it first compares the benefit being provided with the list of benefits set forth in § 1002(1). If the benefit is covered by the statute, it is then compared with the list of excluded benefits set forth in the Department's "payroll practices" regulation, 29 C.F.R. 2510.3-1(b). Where the benefit is listed in the statute, but *not* in the regulation, as was the case in *Gilbert,* then ERISA is said to cover the benefit, regardless of the method by which it is provided. Where the benefit is listed in both the statute *and* the regulation, as was the case in *Henning,* then the mention of the benefit in the regulation is said to nullify its specific inclusion in the statute. Under this approach, the question of coverage can be resolved differently *despite* the fact that two types of benefits are both referred to in § 1002(1). This result is indefensible.

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To defend this inconsistency, as the Department of Labor does, on the ground that *Henning* involved a benefit that was denominated a "vacation benefit", while the benefit in *Gilbert* was denominated a "severance benefit", is to exalt *names* over both form *and* substance.[19]

Unless and until it is recognized that the scope and coverage of the Act must be determined in accordance with a two-step *structural* approach, as opposed to a one or two-step *benefits* approach,[20] the emergence of such inconsistent, arbitrary and ad hoc rulings will continue. The fact that the Department of Labor is content to continue to preside over this confusion, and to rule on benefits on an ad hoc basis, is no answer. The basic threshold definitional questions which appellants have raised must be resolved.

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The question of which of the two basic approaches to ERISA coverage—the structural approach or the benefits approach—is the *correct* one is the question to be answered by this Court. The Department's approach is untenable.

[19] The Department's position is anomalous. Either its payroll practices regulation is *under-inclusive* because *no* personnel policies or payroll practices are covered by the Act, regardless of the benefit involved, *or* the regulation is in *direct conflict* with the statute because it exempts from the statute's coverage practices to which it was specifically meant to apply. (*See* discussion at pp. 4-6 of the Joint Brief of Appellants in Opposition to Motion to Dismiss or Affirm.)

[20] The two-step process mandated by the statute entails the following: First, it must be determined whether a "plan, fund or program" has been established or maintained within the meaning of the Act, because the existence of such a "plan, fund or program" is a prerequisite to the creation of an "employee welfare benefit plan." 29 U.S.C. § 1002(1). *See also* footnote 4, *ante*. Second, assuming the existence of a "plan," it must then be determined whether the plan qualifies as an "employee welfare benefit plan." This is dependent upon whether the benefit being provided by way of the plan is a "covered" benefit under subparagraphs (A) and/or (B) of § 1002(1). The Department of Labor, like the courts in *Gilbert* and *Henning*, have ignored the critical first step.

IV.

The Questions Presented by Appellants Merit Plenary Consideration.

While everyone agrees that Congress intended to "occupy the field," everyone disagrees as to *which* field Congress intended to occupy.

The Ninth Circuit disagrees with the Second Circuit. (*Cf.* the *Henning* and *Gilbert* decisions.) The federal courts disagree with the state courts. (*Cf.* Appendices B and D to 85-460 J.S.) The state attorneys general disagree with the Solicitor General. (*Cf.* Brief of the States as Amici Curiae Supporting Appellants with the Brief of the United States as Amicus Curiae.) Appellants in *Gilbert* disagree with petitioners in *Henning,* and the United States Department of Labor disagrees with both. (*Cf.* 85-441 J.S. and 85-460 J.S. with 85-1648 J.S.).

Nothing will be gained by prolonging the current state of confusion, and much will be lost.[21]

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[21] Indeed, it is with ill grace that the United States argues in its amicus brief that it should be permitted to continue to preside over a jurisdiction which, to appellants' knowledge, the Department of Labor has *never* sought to exercise—that is, jurisdiction over simple employer personnel policies. To dismantle a state apparatus, which has long met employees' needs in this regard, without first providing a realistic alternative *and* without first determining whether this result is mandated by statute, would be irresponsible. At present, neither the United States Department of Labor nor the federal courts are equipped to handle the many thousands, if not ultimately hundreds of thousands, of benefit claims with which they will be deluged if the basic premises upon which the federal courts are currently operating concerning ERISA are not reconsidered.

CONCLUSION

For the reasons stated, the questions presented by these appeals, and by the petitions and appeals in *Henning* and *Holland,* should be given plenary consideration.

Respectfully submitted,

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Committee

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Supreme Court of the United States

October Term, 1985

Harold Roberts, as Commissioner of Labor of the State of New York,

Appellant,

v.

Rotary Club of Duarte, Inc.,

Appellee.

Irene Grassey, *et al.*,

Appellants,

v.

Rotarians of Lynchburg, Inc.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE UNITED FARM WORKERS OF AMERICA; COMMITTEE OF INTERNS AND RESIDENTS; COMMUNICATIONS WORKERS OF AMERICA; DISTRICT ONE, INTERNATIONAL LADIES GARMENT WORKERS' UNION; UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA; LABOR EDUCATION AND RESEARCH PROJECT; AND NATIONAL CONFERENCE OF BLACK LAWYERS

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INTEREST OF AMICI

THE UNITED FARM WORKERS OF AMERICA, AFL-CIO ("UFW") is a labor organization which represents agricultural employees. Its membership fluctuates in size from season to season in a given year, but in the aggregate, it represents over 100,000 workers, most of whom live and work in the states of California, Arizona, Florida and Texas.

Farmworkers receive no protection under the National Labor Relations Act, and in most states, their employment relations are theoretically left to the vagaries of the free market. In practice, many growers receive both direct and indirect government assistance in various forms. To the extent employment contracts (oral or written) exist in farm labor, they are ordinarily enforceable by means of common law or statutory remedies in state courts. Hence, the UFW's interest in

the Gilbert v. Burlington case: decisions such as that of the Second Circuit Court of Appeals in Gilbert, and of the Ninth Circuit in Scott v. Gulf Oil, 754 F.2d 1499, threaten the viability of the only remedies available to many farmworkers. Such decisions create the tangible, poignant irony that a law (ERISA) designed to protect workers from abuses in the administration of funds from which they are to derive benefits, actually deprives workers of remedies previously available. The UFW therefore respectfully requests that it be permitted to join in the arguments of amici herein, and that this brief amicus curiae be accepted and considered by this honorable Court.

THE COMMITTEE OF INTERNS AND RESIDENTS ("CIR") is a labor union representing 5,000 salaried physicians in private and public hos-

pitals in New York and New Jersey who are not organized pursuant to the National Labor Relations Act.

The Committee of Interns and Residents seeks to join in the brief submitted by labor organizations as amicus curiae on behalf of appellants in this case because the issues raised in the appellants' jurisdictional statements and this Court's decision of those issues will have a substantial impact on the day-to-day operation of amicus and long term and profound implications for its operation generally.

Specifically, if an employer's simple promise or undertaking to pay benefits such as severance pay, sick pay, holiday or personal leave, is construed to constitute a "plan" with the meaning of ERISA and, therefore, to trigger pre-emption, amici will suffer or observe the following consequences: salaried physicians not protected by collective bar-

gaining agreements negotiated under the NLRA will lose the minimal protection of administrative and common-law remedies should employers default on promises to provide benefits. Faced with the threat of becoming dependent upon employer discretion and good will for such benefits, salaried physicians will be reluctant to exercise their right to organize into labor unions.

The Committee of Interns and Residents therefore seeks to join appellants in urging the Court to reverse the decision of the Court of Appeals and to obtain a ruling that a simple contractual promise to provide benefits such as severance pay does not constitute a plan within the meaning of ERISA so as to preempt the operation of state contractual or statutory law in this field.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, DISTRICT ONE ("CWA") is a labor union representing 125,000 workers in the private and public sectors in New York, New Jersey and the New England States.

Communications Workers of America, District One seeks to join in the brief submitted by labor organizations as amicus curiae on behalf of appellants in this case because this Court's decision of the issues they raise will have a profound impact on the constituency which the amicus seeks to serve.

CWA is specifically concerned about the effect of a ruling such as that of the Second Circuit on its ability to organize new members. The net effect of an expansive reading of the term "plan" is to reduce an employee's contractual right to a specific benefit to a right to engage in costly litigation under ERISA. Amici have found that decisions which tend to make benefits less secure have a chil-

ling effect on the exercise by workers of the right to associate with union organizers and others involved in the early stages of organizing.

It must be emphasized that the workers affected and disadvantaged by this interpretation are precisely those most in need of protection, particularly those not represented by labor unions and those whose continued employment is jeopardized by the actions of their employers.

Communications Workers of America, District One, therefore seeks to join in the petition before the Court to reverse the decision of the Court of Appeals and to obtain a ruling that a simple contractual promise to provide benefits such as severance pay does not constitute a plan within the meaning of ERISA so as to pre-empt the operation of state law in this field.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO ("ILGWU") is a labor union representing hundreds of thousands of workers in the apparel and clothing industries. These industries have long been characterized by sweatshops and worker exploitation. Employer avoidance of payment of severance, holiday, vacation, sick pay and the like is endemic to these industries. In recent years, high levels of imported garments made at rates of pay as low as $0.16 per hour have aggravated this serious problem.

ILGWU wishes to join in the amicus curiae briefs submitted by labor organizations and state attorneys general in support of the petition in this case because the issue presented for review has a significant effect on the wages and working conditions which prevail in the apparel and clothing industries. If state statutes which effectively enforce direct promises of employers to pay wage sup-

plements, such as severance pay, are preempted by federal statutes such as ERISA, such promises will go largely unenforced and the compensation of apparel employees will be further depressed. This will adversely affect the terms and conditions of employment of all employees in the apparel industries and make it more difficult to improve the factory conditions under which they labor.

Accordingly, International Ladies' Garment Workers' Union wishes to join in supporting the petition for review in this case which seeks to reverse decisions of courts of appeals which deprive states of jurisdiction to enforce direct contractual promises by employers to make severance and other payments to their employees.

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA ("UE") is a labor organization within the meaning of the National Labor Relations Act as amended, 29 U.S.C. Section

152(5) and an employee organization within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1002(4). It represents thousands of workers employed by employers engaged in heavy and light production in the electrical, radio, electronics and machine industries with respect to their wages, hours and other conditions of employment, including retirement income and welfare benefits. On behalf of these employees UE has entered into collective bargaining contracts with hundreds of employers throughout the country including General Electric Company and Westinghouse Electric Corporation.

The interest of UE in this case is both general and specific. Generally, it has an interest in the working conditions of all employees in the industries with which it is concerned whether or not they are organized and members of the Union. The denial of prac-

tical legal assistance afforded to unorganized workers by state agencies such as a Department of Labor, a consequence of the decision sought to be reviewed, is a matter of deep concern to UE.

Specifically, UE is directly interested in Equal Employment Opportunity Commission v. Westinghouse Electric Corporation, Civil No. #84-4799 (E.D. Pa.), wherein Westinghouse Electric Corporation has raised as a matter of defense that it is not obligated to pay severance pay to certain of its employees (including UE-represented individuals) because it is excused therefrom under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(2) on the ground that the severance pay arrangement is a bona fide employee benefit plan. Westinghouse Electric Corporation raises this defense notwithstanding a specific ruling in EEOC v. Westinghouse, 725 F.2d 211, 224-5 (3d Cir. 1983), an appeal

from a summary judgment in another case, that the severance plan is not a bona fide employee benefit plan.

The extent to which or whether the determination here sought to be reviewed by the Supreme Court may impinge upon the definition of a bona fide employee benefit plan in contexts apart from that of ERISA deeply concerns UE and may well affect the interests of the employees it represents.

THE LABOR EDUCATION AND RESEARCH PROJECT ("LERP") is a network of union activists and others with an interest in the labor movement, which informs its members about labor issues and facilitates an exchange of information about such subjects as organizing into unions, contracts, bargaining, and labor-management cooperation. LERP seeks to join in the brief submitted as amicus curiae on behalf of appel-

lants in this case because the Court's decision will have a substantial impact on all workers.

Specifically, if an employer's simple promise to pay benefits such as severance or sick pay is construed to constitute a "plan" within the meaning of ERISA and therefore to trigger pre-emption, the workers with whose interests the amici are concerned will find it more difficult to enforce their contracts with employers.

THE NATIONAL CONFERENCE OF BLACK LAWYERS (NCBL) is a nation-wide organization of attorneys committed to using their skills to eradicate the racism that continues to corrupt the political, economic, social and legal institutions of this country. NCBL is particularly concerned about the decision of the Second Circuit in Gilbert, et al. v. Burlington Industries because it exemplifies one of the ways in which apparently "color blind" rulings

contribute to the continuing and, indeed, increasing oppression of Black people. While ostensibly not a case about race or discrimination, Gilbert will have a disparate impact on Black workers, the vast majority of whom are still not represented by labor unions and, consequently, cannot rely on the National Labor Relations Act to enforce their contractual rights to severance pay.

The question of severance pay is also one which is of particular importance to NCBL because as a result of a history of racial discrimination in employment, Black workers are often the last hired and first fired. Once terminated, Black workers often face the problem of discrimination in securing new employment. The security of their right to severance pay is, therefore, an extremely important concern to Black workers, as is the ability to

use administrative mechanisms and state wage collection laws to recover benefits unjustly withheld.

NCBL therefore urges this Court to interpret each of the distinct provisions of ERISA as part of an integral scheme designed to increase worker security and require the fulfillment of promises to provide benefits. To do otherwise at this period in our history is to wink at a subtle but potent form of discrimination.

Introduction

Amici, representing collectively over half a million organized workers active in a wide variety of industries including manufacturing, communications, electronics, health care, textiles and agriculture, file this brief in support of plaintiffs-appellants and the State of New York in Gilbert et al. v. Burlington Industries, (hereinafter Gilbert) (S.Ct. Dkt. Nos. 85-441 and 85-460) because

amici believe the issues raised by this case and their resolution will have a substantial impact on labor unions and their members in a variety of ways detailed below. They seek, therefore, to protect and vindicate their own rights, and to fulfill the historic mission of organized labor to protect the rights of all workers, both organized and not-yet-organized.

They assert first, the importance of maintaining a clear focus on the purposes for which ERISA was enacted and the problems Congress sought to resolve through this statute. Secondly, they emphasize the unintentional but seriously damaging effect decisions such as that of the Second Circuit below and similar decisions in other circuits will have on the ability of labor unions to secure benefits for their members. Finally, amici urge this Court to consider the chilling effect of such decisions upon their right and ability to organize new workers into collective bargaining units.

1. The Parties

The parties to this action in many ways typify the antagonists that find themselves locked in some of the most difficult labor-management struggles today.

They represent, on the one hand, unorganized workers with no institution or agency to assert and protect their rights or give voice to their collective grievances, and, on the other, a large corporate entity whose profit margins are currently threatened by competition from imports from nations with significantly lower labor costs. Amici are acutely concerned about the larger question raised by the plaintiffs-appellants -- whether an employer can avoid severance pay obligations by contracting to, in effect, sell employees as well as machines and stock to another corporation. Amici urge this Court not to lose sight

of these realities while giving direction to lower courts lost in the toils of intricate statutory construction.

The plaintiffs in Gilbert are thirty-six unorganized workers who had been employed by Burlington Industries for varying periods of time, ranging from a minimum of seven years and seven months to thirty-three years (with an average of seventeen years). At the time they were severed from Burlington's payroll, on January 4, 1982, all were employed by its socks and hosiery division, which was sold as a going concern to "a large manufacturer". (Joint Appendix to Jurisdictional Statements at 22), (hereinafter referred to as "Joint Appendix").

At the time appellants were terminated by Burlington, the employer's severance pay policy was contained in two documents: (1) an employee handbook and (2) a policy manual that was made available, but not distributed, to

employees. Gilbert v. Burlington Industries, 765 F.2d 320, 323 (2d Cir. 1985). The policy provided that "employees who met certain requirements and were involuntarily terminated from the Company", 765 F.2d at 323, would receive severance pay based upon age and length of service, according to fixed rates. Employees terminated "due to circumstances such as elimination or modification of operations or other job eliminations due to bona fide organizational changes", Joint Appendix at 23, were entitled to severance pay. Appellants fall into that category.

2. The Procedural History

At this stage of the litigation the ultimate question of whether the Burlington employees are entitled to recover their severance pay is not yet ripe for resolution. On September 2, 1983, the New York State Department of Labor ordered the employer to fulfill

its severance pay obligations to its former employees under New York's Wage Collection Statute (New York Labor Law § 198-c). Enforcement of that order has been enjoined, however. Plaintiff-appellants come before this Court seeking resolution of the threshold question: were their benefits provided by means of a "plan" under ERISA (29 U.S.C. § 1001, et seq.) so as to preclude the application of state law? The answer given by this Court will determine whether millions of workers are entitled to direct remedies against their employers as well as recourse against their pension and welfare plans under ERISA.

Amici believe that this procedural history is telling. A large corporation has forestalled payment of benefits to a group of older workers who, during a four year period of double-digit inflation, have already lost significant value on their promised severance benefits, and have incurred the expenses of

two years of federal litigation. Amici cannot believe that those who drafted and enacted ERISA foresaw or intended that their efforts "to safeguard the well-being and security of working men and women", Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982), would be so distorted.

Argument

Amici do not seek to reargue the issue raised by plaintiff-appellants. Rather, they urge the Court to place the question presented and its answer squarely within the context of the Congressional intent and legislative history which inform ERISA as a whole. In order to do this properly, the Court must both analyze Congressional statements of purpose and review decisional law under ERISA, and frankly consider the realities of this litigation. Amici are persuaded that this Court will not approve a statutory construction of isolated

terms of the Act that will undermine and vitiate its purposes. This, unfortunately, is precisely the result of the approach urged by the defendant-appellee and adopted by the Court below.

While it appears elementary, amici cannot overstate the importance of construing the separate words and provisions of ERISA in light of and in order to effect the purposes for which the statute was enacted:

> ERISA, like the Civil Rights Act of 1871 and 1964, and the Labor-Management Reporting and Disclosure Act, is remedial legislation which should be liberally construed in favor of protecting participants in employee benefits plans.

Smith v. CMTA-IAM Pension Trust, 746 F.2d 587 (9th Cir. 1984) (emphasis added). And see, McDougall v. Donovan, 552 F. Supp. 1206, 1214 (N.D. Ill. 1982)("Each provision of ERISA must be interpreted in light of the Congressional intent underlying the Act.").

Prominent among the Congressional findings and declaration of policy accompanying the text of the statute is the specification of the purposes for which ERISA was enacted, including the protection of "the continued well-being and security of millions of employees and their dependents" and the "stability of employment and the successful development of industrial relations." 29 U.S.C. § 1001.

Congress therefore found that minimum standards must be established to regulate the operation of pension and welfare plans lest "employees and their beneficiaries [be] . . . deprived of anticipated benefits." Id. Three years after ERISA's enactment, the President recognized that "ERISA is an essential step in the protection of worker pension rights."1/ Message of the President, August 10, 1978, printed at 29 U.S.C.A. § 1001, at 53. So much of the statute's general purpose is almost in-

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1/ The statute was, of course, designed to protect rights to welfare benefits as well.

variably acknowledged, at least in passing. See, e.g., Scott v. Gulf Oil Corp., 754 F.2d 1499, 1501 (9th Cir. 1985) ("ERISA is a remedial statute designed to protect the interests of employees in pension and welfare plans . . ."). The problem is that no court to date has given adequate consideration to what light this purpose casts upon the meaning of the word "plan", used as a term of art within the Act.

This Court has signalled the importance of resolving disputes concerning ERISA's scope and effect in numerous discussions of "the policy concerns behind ERISA." Central States, Southeast and Southwest Areas Pension Fund, et al. v. Central Transport, __ U.S. __, 53 L.W. 4811, 4813 (June 19, 1985). In Central States, the Court referred to its decision in Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980), wherein it recognized the underlying Congressional intent

"to correct this condition [i.e., insecurity of benefits] by making sure that if a worker has been promised a defined benefit upon retirement . . . he will actually receive it." 446 U.S. at 375, cited in Central States, 53 U.S.L.W. at 4814.

In Nachman, this Court referred to Senator Bensten's evocation of the "great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated." 446 U.S. at 374. The denial of welfare benefits to a large group of employees, while perhaps of smaller dimensions, also represents great personal tragedy, especially for the older worker terminated through no fault of his or her own, or the Black or other minority worker terminated because of plant reorganization and lack of seniority. Severance benefits, in such circumstances, may be provided by means of a "welfare benefit plan", 29 U.S.C. § 1002(1), which is "established and

maintained", id., within the meaning of ERISA, or directly by an employer as a form of deferred compensation, or both. ERISA was enacted to ensure that the security provided by benefit plans would not prove illusory. State remedies and the NLRA are intended to serve the same function with regard to direct employer liability.

Employers who argue that ERISA's remedial nature entitles them to a liberal construction of the term "plan" are simply wrong. The rule of lenity is to be applied in favor of the beneficiaries of remedial legislation, and not in favor of those who seek to escape its requirements.2/ It is not a rule of first re-

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2/ It is not an exaggeration to say that employers, as a rule, prevail under ERISA. In only one (Blau v. Del Monte, 748 F.2d 1348 (9th Cir. 1984)) of the sixteen cases collected in Appendix B of Appellant Gilbert's Jurisdictional Statement did employees' benefit claims prevail over employers' assertions that ERISA should be applied and that an "arbitrary and capricious" standard of review was appropriate. Two other employee claims survived motions for summary judgment

(footnote continued)

sort, but rather "comes into operation at the end of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." Callanan v. United States, 364 U.S. 587, 596 (1961) (footnote omitted).

Employers are equally wrong when they argue that ERISA frees them from direct liability under simple contracts with their employees. The legislative history is replete with evidence that ERISA was intended to displace the common law of trusts and replace it with a more comprehensive set of principles regarding the management of "employee benefit trusts." See, e.g., H. R. Rep. No. 93-533, reprinted in 1974 U.S. Code Cong. & Admin. News (hereinafter "USCCANS") 4643, 4650, 4651;

(footnote continued from previous page)
(Petrella v. NL Industries, Inc., 529 F. Supp. 1357, 1361 (D.N.J. 1982) and Russell v. Mass. Mutual Life Ins. Co., 722 F.2d 482, 485 (9th Cir. 1982) rev'd on other grounds, ___ U.S. ___, 53 U.S.L.W. 4938 (6/25/85)), but the vast majority were denied outright.

Sen. Rep. No. 93-127, reprinted in 1974 USCCANS 4841, 4865, 4869, 4881, 4882; Sen. Rep. No. 93-383, reprinted in 1974 USCCANS 4917; H. R. Rep. No. 93-1280, reprinted in 1974 USCCANS at pp. 5076, 5164; (Statement of Hon. Al Ullman), 1974 USCCANS at p. 5171; (Statement of Hon. Harrison A. Williams, Jr.), 1974 USCCANS at p. 5186.

There is not one iota of evidence, however, to support the position that ERISA was ever intended to abolish the common law of contracts as it applies to employer-employee relations, or to displace state administrative remedies that have long been available under wage collection statutes. Surely, if this had been one of Congress' objectives, it would have left something more than "clanging silence" as evidence of its intent. Sedima, S.P.R.L. v. Imrex, et al., ___ U.S. ___, 53 L.W. 5034, 5038 n. 23 (July 1, 1985).

Absent a clear indication by Congress that it intended to eradicate the law of direct employer liability on contract, one can hardly countenance a construction of the Act which accomplishes such a result.

Thus, as it did in Nachman, a careful study of ERISA's legislative history and purpose should once again guide the Court to reject an interpretation of the statute which limits rather than enhances the ability of employees to recover promised benefits and permits employers to escape liability, whether directly to their employees or indirectly to employee plans.

This Court simply cannot be blind to the identity of the parties most persistently invoking ERISA for purposes quite contrary to the Congressional intent "to safeguard the well-being and security of working men and women", Donovan v. Dillingham, supra at 1372. Increasingly, these parties include major em-

ployers such as Gulf Oil [Scott v. Gulf Oil Corp., supra -- severance pay denied], Del Monte Corporation [Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984) -- employer sought to escape liability for "secret" severance pay obligation], Delta Airlines [Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1982) -- employer sought to escape duty of non-discrimination imposed by Title VII], Westinghouse Corporation [E.E.O.C. v. Westinghouse, 725 F.2d 211 (3d Cir. 1983), cert. denied, ___ U.S. ___, 105 S.Ct. 92 (1984) -- employer defended against an age discrimination claim by asserting alleged discriminatory action constituted a bona fide benefit plan under ERISA], Marcal Paper Mills [Marcal Paper Mills, Inc. v. Ewing, Civ. No. 83-0274-B, (D. Maine August 27, 1985) -- employer sought to escape obligations under plant closing statute], and a host of others. The most dramatic evidence of employer action to divert

ERISA from its intended purposes may be found in the style of a single Ninth Circuit case brought by the California Hospital Association, the California Restaurant Association, the California Manufacturers' Association, the Merchants and Manufacturers' Association, the California Hotel and Motel Association, and the California Chamber of Commerce. Thus arrayed, these employers' associations joined together to sue California's Commissioner of Labor and to obtain an injunction prohibiting enforcement of their obligations to provide vacation pay on an accrued per diem basis. They argued that all such obligations were enforceable solely by way of ERISA. California Association of Hospitals, etc. v. Henning, Commissioner of Labor, Civ. Nos. 83-6381, 83-6416 (9th Cir. September 6, 1985).

The spectacle of major employers and employers' associations pretending to champion ERISA's ability to protect workers should be

treated with all the skepticism due a fox's protestations of expertise in the field of chicken-watching.

Employers, envious of ERISA's vast powers, seek both to ignore its mandates and evade its responsibilities while distorting the meaning of its terms. While Burlington's failure to file the documents required by ERISA should not relieve it of any duties the statute imposes upon any bona fide plan it may maintain, amici believe that this failure reveals its determination to avoid any and all liability for benefits, however provided.3/

3/ Burlington filed none of the documents required by ERISA between 1974 and 1983. The documents then filed reflect a hasty decision to appear to comply with ERISA once its "protections" were sought. To characterize its action as compliance with even the minimal reporting and disclosure provisions of ERISA which apply to welfare benefit plans is to exalt form over substance. Information responsive to virtually every question was refused as "not applicable".

This Court can and must restore ERISA to its original intent: safeguarding the integrity and viability of employee benefit plans. This task can only be accomplished by insisting that each term of the statute be read in light of that purpose. Thus construed, it is clear that ERISA may not be used as the defendant-appellee desires -- as a shield by employers against direct contractual liability to their employees.

It is no answer that the employees in Gilbert have not yet lost their claims under ERISA. They have been deprived of benefits due over three years ago; they have been denied the right to enforce an order awarding them those benefits; and they have been forced to bear the additional expense and uncertainty of litigation. Once the case returns to the district court on the merits, the employer will surely argue that they must prove not only the existence of an obligation to provide

benefits and a failure to fulfill that obligation, but also that the denial of benefits was "arbitrary and capricious." See, Slack v. Burlington Industries, Civ. No. 83-274-G (4th Cir. Oct. 17, 1985), a companion case to Gilbert, in which the Fourth Circuit judged Burlington's denial of benefits under an "arbitrary and capricious" standard and found no liability for severance benefits.4/

Amici certainly recognize that ERISA does not guarantee that every employee will receive every benefit available to employees generally. What it does attempt to guarantee is fairness in the administration of benefit-providing mechanisms in order to enhance the security of the workforce. To adopt the construction proposed by Burlington converts ERISA into a device for creating insecurity

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4/ Amici understand that the employees in Slack will seek review in this Court on several grounds, including the importation of the "arbitrary and capricious" standard from trust law into the field of employee benefit mechanisms not established or operated as trusts.

among workers. Not only does it undermine the certainty that they will receive benefits due by taking away direct employer liability under state statutes and common law, but it makes their receipt of benefits at all subject to the total discretion of an employer acting solely in its own best interest.5/

The interests of all working people, organized and not-yet-organized, are seriously damaged by any device that makes their ability to collect benefits contingent upon employer discretion. This is doubly so in the case of workers participating in organizing campaigns prior to formal union affiliation and certification. The mere knowledge that benefits are contingent upon an employer's discretion will have a substantial chilling effect on the abi-

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5/ ERISA contemplates the establishment of a separate entity operated according to the fiduciary standards imposed by the federal common law of trusts developed under ERISA. It does not contemplate giving employers who control the payment of benefits through an automatic payroll practice the benefit of the "arbitrary and capricious" standard.

lity of workers to fully associate with representatives of organized labor according to the mandates and policy of the NLRA.

CONCLUSION

For all the foregoing reasons, the questions presented by the appeals in Roberts v. Burlington Industries, Inc. and Gilbert, et al. v. Burlington Industries, Inc. should be given plenary consideration.

Respectfully submitted,

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Nos. 85-441 & 85-460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LILLIAN ROBERTS,
AS COMMISSIONER OF LABOR
OF THE STATE OF NEW YORK,
Appellant,

v.

BURLINGTON INDUSTRIES, INC.,
Appellee.

IRVING GILBERT, *ET AL.*,
Appellants,

v.

BURLINGTON INDUSTRIES, INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE STATES AS *AMICI CURIAE* SUPPORTING APPELLANTS*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 85-441 & 85-460

LILLIAN ROBERTS,
AS COMMISSIONER OF LABOR
OF THE STATE OF NEW YORK,
Appellant,

v.

BURLINGTON INDUSTRIES, INC.,
Appellee.

IRVING GILBERT, *ET AL.*,
Appellants,

v.

BURLINGTON INDUSTRIES, INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE STATES AS *AMICI CURIAE* SUPPORTING APPELLANTS

STATEMENT OF INTEREST OF *AMICI CURIAE*

This *amici curiae* brief is filed as a matter of right under Rule 36, Supreme Court Rules, which permits the filing of such a brief without consent of the parties or leave of the Court when presented for a State sponsored by its Attorney General.

The issues raised by these cases on appeal are of great interest to all states, including the following, which join in this brief: the States of Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming (hereinafter "the *amici* states").

The decision below held that § 198-c, of the New York Labor Law and the state common law of contracts are preempted by ERISA insofar as they relate to the severance policy of appellee Burlington Industries, Inc. (hereafter Burlington). The purpose of § 198-c is essentially to enforce the payment of wages earned by and due to employees. At least 46 other states, including most *amici* states have statutes to enforce wage payment. Thirty-one of these statutes include severance benefits among the wages whose payment is enforced. Moreover, similar to New York virtually all states have a common law of contracts which is applicable to any agreement to pay severance wages. The continued viability of these statutes and laws, which is of great concern to all states, is brought into serious question by the preemptive determination made in this case below. The State of North Carolina has a special interest in this case because its Commissioner of Labor has given notice of appeal in the case of *Slack and Brooks v. Burlington Industries, Inc.*, United States Court of Appeals, Fourth Circuit (No. 84-2257, September 3, 1985), which involves the same issues presented in the instant appeal. Should the issues be decided by this Court as they were below, the authority of states to enforce payment of wages to their residents will be greatly reduced. The substantial interest of the states to retain their traditional authority to protect their citizenry through wage payment enforcement prompts the *amici* states to file this brief.

SUMMARY OF ARGUMENT

The *amici* states respectfully urge this Court to grant plenary consideration on appeal to the substantial federal preemption question raised in the appeals by the *Gilbert* plaintiffs and the intervenor-plaintiff Lillian Roberts, Commissioner of Labor of the State of New York. The issues raised by these appeals are of vital concern to the states and affect an area of employee welfare which has been overwhelmingly a state responsibility. The question whether an employer's simple agreement to pay severance pay constitutes an employee welfare benefit plan within the meaning of ERISA, so that state wage enforcement statutes and common law are preempted, is one which has not been addressed by this Court. The answer to this question will have nationwide impact affecting procedures and protections offered by the states to millions of employees. Such draconian results were never intended by Congress and merit this Court's consideration.

The decision of the court below appealed in this case presents a substantial question of statutory interpretation. Although there is no doubt that ERISA has a broad reach, that reach remains limited to employee welfare benefits "plans" and does not encompass a promise or agreement by an employer to pay workers out of general assets. Such a payroll practice in no way rises to the level of a "plan" subject to ERISA. A plan which is subject to ERISA is a formally structured entity with assets and an identity separate and apart from the employer. If the detailed requirements found in ERISA's provisions are to have any meaning, then the statute must be interpreted to limit its scope to those "plans" which were the subject of Congress's concern, and not to include simple contract agreements already addressed by common law and state oversight.

Finally, miscomprehension of ERISA's scope and thus the extent of its preemption has given rise to conflicting decisions between circuit courts of appeals. Therefore, the *amici* states contend these appeals present compelling issues meriting the attention of this Court.

I. This Court Should Grant Plenary Consideration On Appeal Because The Questions Presented Are Of Great Importance To Virtually All States And To Millions Of Persons Employed In Those States.

The resolution of the issues presented in this case has far-reaching consequences affecting virtually all, if not indeed all, states. Forty-six (46) states and the District of Columbia have statutes which require payment of wages, similar to the New York statute which was held below to be preempted. Of these forty-seven (47) jurisdictions, thirty-one (31) enforce payment of promised severance pay under their wage collection statutes. Moreover, in nearly all, if not all fifty states, promised severance payments are enforceable under each state's common law of contracts, which was also held below to be preempted.

Virtually millions of employees will lose protection of their right to severance pay under state wage collection laws if the decision below is affirmed. A recent Bureau of Labor Statistics study of twenty-one million employees from a cross-section of the nation's medium and large private firms shows that sixty-one percent of professional and administrative employees, fifty-seven percent of technical and clerical employees and thirty percent of production employees are eligible for severance pay under their employers' policies. See "Employee Benefits in Medium and Large Firms, 1984," U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 2237 (June 1985).

The issue of preemption of these state laws and statutes is significant for several qualitative reasons beyond the sheer quantitative effect of voiding so many state laws. First, the question is presented whether Congress intended ERISA to upset the traditional balance between state and federal enforcement of employee compensation. Other federal laws regulating employee compensation do not seek to impose national uniformity through broad preemption provisions, but instead permit the states to provide more stringent protections if they wish. *See, e.g.,* the Fair Labor Standards Act, 29 U.S.C. § 218 (1982); the Age Discrimination in Employment Act, 29 U.S.C. § 633 (1982); and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4 (1982). Partially in response to this encouragement and, in part, to reinforce and facilitate the common law mechanisms of employee compensation enforcement, the vast majority of states have adopted wage payment collection statutes. Thus, one of the significant issues brought before the Court is whether the numerous state regulatory schemes encouraged by Congress through other enactments, which continue to exist, are suddenly and decisively voided by ERISA.

Second, is the qualitative significance of the deleterious impact which ERISA preemption of state laws will have on the ability of millions of employees to collect their severance benefits. This impact results from both a loss of access to enforcement assistance under state laws and to the less onerous standard of conduct which applies to fiduciaries under ERISA than applies to employers under state laws. Each of the thirty-one jurisdictions having a statute enforcing promised severance pay provides administrative assistance to employees in substantiating and collecting their claimed benefits. Combined, these states and the District of Columbia maintain staffs of more than 1,000 persons to provide

this assistance.[1] Should the administrative assistance fail, eighteen of those thirty-one jurisdictions can seek criminal sanctions and twenty-one can file civil suit on behalf of employees against violating employers. Such assistance is critical to employees because in many instances the number of employees and the amount of money involved in a severance claim is so small that the cost to the employee of pursuing the claim on his own is prohibitive. These resources are either clearly lacking or greatly diminished for the employee in claims arising under ERISA. There are no provisions in ERISA for criminal sanctions for nonpayment of benefits. Moreover, the administrative and litigation assistance offered by the United States Department of Labor under ERISA is greatly reduced, if it exists at all.[2]

Should the decision below be allowed to stand, not only will employees seeking to recover severance pay lose significant State assistance, but they will also have

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[1]Appendix I contains examples of the assistance available to employees in several of the *amici* jurisdictions. Appendix C to the Jurisdictional Statement of appellants Irving Gilbert, *et al.*, lists citations to all state statutes under which such assistance is given.

[2]For example, North Carolina has eighteen (18) compliance officers to investigate and resolve complaints of nonpayment of wages, including severance pay. By comparison, the Atlanta regional office of the Labor Management Services Administration, which among its other duties enforces ERISA, has ten (10) investigating officers to handle complaints in a four state area, including North Carolina. None of its investigators reside in North Carolina. By sheer remoteness, size of territory and lack of numbers, the federal staff cannot approximate the administrative assistance offered by the State of North Carolina. Employees in other states may be worse off. The Dallas office of the Labor Management Services Administration has informed the Wyoming Department of Labor that due to the remoteness, vast area, and sparse population of Wyoming and its own paucity of staff, no ERISA complaints originating from Wyoming will be investigated unless large quantities of money and employees are involved.

a more difficult standard of proof. The courts have generally held that an employee seeking payment of benefits under ERISA must prove the plan administrator acted arbitrarily and capriciously in denying the benefits sought. *See, e.g., Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911 (2d Cir. 1982); *Horn v. Mullins*, 650 F.2d 35 (4th Cir. 1981); *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650 (9th Cir. 1981). Under state wage collection statutes and common law contract actions, on the other hand, an employee need only show the employer's contractual obligation to pay the benefits sought and the breach of that promise.

When employees are subjected to this more difficult burden of proof under ERISA, they are often unable to recover benefits which they would be entitled to recover under state law. For example, the Fourth Circuit has recently upheld a decision denying severance pay to former Burlington Industries employees terminated in North Carolina by applying the standard of arbitrary and capricious conduct. *Slack and Brooks v. Burlington Industries, Inc.*, United States Court of Appeals, Fourth Circuit, Nos. 84-2241(L) and 84-2257, September 3, 1985.[3] Earlier, however, the North Carolina Department of Labor had determined that the employees were due the severance pay under the North Carolina Wage and Hour Act, which codifies common law principles of contract as they apply to wage and benefit payments.

This Court should grant full hearing to these appeals in order to resolve whether ERISA should be interpreted to decrease the likelihood that employees will recover promised severance pay by restricting the right of employees to collect benefits to which they are entitled

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[3]The Fourth Circuit decision, which involved the same sale which is the subject of this proceeding, is also currently on appeal to this Court.

under state law. First, such an interpretation is contrary to the stated Congressional intent in adopting ERISA to increase the protection for participants and beneficiaries of employee plans. *See,* 29 U.S.C. § 1001, Findings and Declaration of Policy. Should this Court let stand the decision below, then ironically ERISA's application may well have the opposite effect of that intended by Congress in that employee protection will have actually decreased rather than increased as a result of ERISA.

Second, decreasing the likelihood that employees will receive their promised severance pay will adversely affect the states and their citizens. Protection of the financial and general well-being of wage earners and their families has been an area of significant state interest and action. If employees are not paid their severance wages when due, they and their families often suffer severe financial hardships. Many wage earners live on such tight budgets that the loss of just one paycheck can result in a family crisis. Rent goes unpaid, utilities are shut off, or sufficient amounts of food and other necessities are not affordable. States have a substantial interest in preventing such hardships by assuring prompt payment of all severance wages. When earned severance wages go unpaid and financial crises strike families, states often bear additional financial burdens through social service programs designed to protect the general welfare of the states' citizens. Unemployment benefits, general and special assistance, and other costly forms of social relief increase when earned wages go unpaid. These social programs cost the State and their taxpayers great sums of money. It is very much in the states' interest to minimize these expenses by enforcing payment of all severance wages earned.

The issues presented by this case are also significant because the Court of Appeals' expansive reading of ERISA's preemption provision and definition of an "employee benefit plan" threatens many other state statutes

which in some way involve or touch upon employee benefits. By reading ERISA's definition of benefit plan out of the context of ERISA's entire legislative framework and history, the court below interpreted that section to include mere promises consisting of no more than written statements of policy that have no identity apart from the employer itself. The court's holding could equally be applied to promises to provide periodic or occasional training, or even child care, since ERISA's definition of a benefit plan expressly encompasses plans that provide such benefits. *See,* 29 U.S.C. § 1002(1)(A).

II. Appellants Present The Substantial Question Whether A Promise Or Agreement To Pay Severance, Without More, Does Not Constitute A Welfare Benefit Plan Within The Meaning Of ERISA.

Congress enacted ERISA in an effort to protect employees whose pensions, annuities, retirement and other benefits were tied up in and dependent upon complex plans about which they knew little or nothing, and some of which were fraudulently or negligently mismanaged and subject to haphazard regulation. It sought to regulate pension plans and, to a lesser extent, other types of benefit plans, in order to help insure employees a modicum of security in the expectation of benefits. As Congress declared, "the continued well-being and security of millions of employees and their dependents are directly affected by these plans . . ., that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards be provided . . . ." 29 U.S.C. § 1001(a).

In the instant case, whether defendant's practice of granting severance pay is a "plan" governed by the provisions of ERISA is a threshold question. If it is not a

plan within the ambit of ERISA, then New York's statutory and common law are not superseded or preempted and the provisions of EPISA do not affect or have application to plaintiffs' right to recover. The court below erred in concluding that defendant's promise to pay severance pay is an "employee welfare benefit plan" subject to ERISA.

The Department of Labor has promulgated a series of interpretive regulations that touch on this question. Unfortunately, when analyzed, the regulations do not squarely answer the question presented herein because they interpret the phrase "welfare benefit" and not the word "plan." However, the regulations do lend support to the conclusion that benefits merely promised by an employer are to be distinguished from welfare benefit plans regulated by ERISA. When vacation pay, holiday pay, sick pay and similar wage-related benefits are paid by the employer from its general assets, the Secretary has interpreted those benefits to be payroll practices rather than part of a welfare benefit plan. *See,* 29 C.F.R. 2510.3-1(b). Since vacation, holiday and sick pay are benefits listed in the ERISA definition of welfare benefit plan,[4] through this regulation the Secretary is explicitly recognizing that the mere promise of the listed benefits by an employer falls short of qualifying as a welfare benefit plan.

The court below concluded that severance pay is a benefit listed in the definition of welfare benefit plan, but it glossed over the issue of whether every promise to pay severance benefits constitutes a welfare benefit plan regulated by ERISA. The Secretary's regulation suggests, on the other hand, that it is also necessary to answer the question of whether a welfare benefit plan exists, before finding coverage by ERISA. In that the decision below ignores this question, if left to stand, it

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[4] *See,* 29 U.S.C. § 1002(1).

will become guiding precedent for the proposition that any employer promise or provision for benefits listed in ERISA will always constitute a benefit plan.

The question left unanswered by the regulations and now presented to this Court is one of statutory interpretation. Section 3(1) of ERISA, 29 U.S.C. § 1002(1), defines an "employee welfare benefit plan" or "welfare plan" as:

> [A]ny plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in § 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Few courts have grappled with interpreting § 3(1) of ERISA, but it is clear from the definition itself that an ERISA covered welfare plan must be (1) a plan, fund, or program, (2) established or maintained, (3) by an employer or an employee organization, or both, (4) for the purpose of providing the benefits enumerated in § 1002(1)(A) or described in § 302(c) of the Labor Management Relations Act ("LMRA"), (5) to participants. *See, Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir. 1982). However, although it is clear on its face that the statute covers any plan, fund or program, the terms "plan" and "program" are not defined in the statute.

Therefore, it is necessary to look at the structure of ERISA's regulating provisions and the intent of Congress to distinguish a welfare benefit "plan" covered by ERISA from mere benefits.

The statutory scheme for ERISA demonstrates that Congress contemplated that a "plan" under ERISA would have a structure giving it an identity of its own separate and apart from the employer. Sections 1102(a) and (b) of the Act suggest what features must be present before a plan can be said to exist, such as a written instrument which (1) names a fiduciary, (2) provides a procedure for establishing and carrying out a funding policy, (3) allocates responsibility among those who will operate and administer the plan, (4) establishes procedures for amending the plan, (5) identifies the persons who will have the authority to amend, and (6) specifies the basis on which payments will be made to and from the plan. 29 U.S.C. § 1102(a) and (b). Under 29 U.S.C. § 1022, a plan administrator is required to file a "plan description" with the United States Department of Labor and to distribute a summary of that plan description to participants and beneficiaries. ERISA also requires the plan administrator to publish and file an annual report for the plan. 29 U.S.C. § 1023 and 1024. Additionally employers must establish and maintain procedures for the timely handling and disposition of day-to-day benefit claims including an understandable written notice setting forth the specific reasons for denial of a claim and a full and prompt fair review of the denial. 29 U.S.C. § 1133.

In addition to the mechanics of establishing a plan, ERISA defines the terms "welfare plan" and "employer" as separate entities. Compare 29 U.S.C. § 1002(1), which provides that the "terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program . . . established or maintained by an employer . . .," with 29 U.S.C. § 1002(5), which provides that "the term 'employer' means any person acting directly as an employer,

or indirectly in the interest of an employer, *in relation to an employee benefit plan . . .*" (Emphasis added.) Although they may exist in relationship to one another, the plan and the employer that established it are separate entities and each must have an identity of its own. *See also,* 29 U.S.C. § 1132(d)(1) ("an employee benefit plan may sue or be sued . . . as an entity"); 29 U.S.C. § 1132(d)(2) (Any money judgment . . . against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person"); 29 U.S.C. §§ 1106(a) and 1107 (wherein it is assumed that a plan and the employer that established it are separate entities and, on the basis of that assumption, certain transactions between them are prohibited).

The language of the statute and the legislative history clearly demonstrate that for a "plan" as defined by ERISA to exist, the "plan" must either have a source of financing independent from the general assets of the employer or commit itself to establishing a funding policy that will assure that an adequate proportion of the employer's income will be dedicated to the plan. ERISA's legislative history and the Act's formal name clearly demonstrate that its drafters were principally concerned with controlling the kinds of abuses typical of funded pension plans. The purpose of ERISA was to regulate a relatively modern economic institution which, in the years following World War II, had experienced phenomenal expansion. H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 2-3, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4640-41. Several years of hearings and studies by Congress revealed substantial problems in the area of pension plan vesting, funding and fiduciary conduct. "The assets of private plans, estimated to be in excess of $150 billion, constitute the only large private *accumulation* of funds which have escaped the imprimatur of effective federal regulation." H.R. Rep. No. 93-533, 93d Cong., 2nd Sess. 3, *reprinted in* 1974 U.S. Code Cong. &

Admin. News, pp. 4639, 4641. (Emphasis added.) With respect to these plans, participants were left to rely upon the state common law of trusts, which Congress found inadequate. Congress's concern was clearly not directed at employer personnel policies, employment contracts and employer compensation practices, which were hardly recent phenomena and which had been for years effectively regulated and enforced by state wage payment statutes and common law contract principles. Since Congress set out merely to control abuses of pension vesting, funding and fiduciary abuses, an overly-expansive reading of the term "benefit plan" to include all unfunded severance agreements, generally involving smaller amounts of money, would result in a gross distortion of Congress's purpose.

The foregoing analysis clearly indicates that ERISA and Congress contemplated a creature quite different from Burlington's severance pay policy which is funded out of its general assets and which had none of the formal documents and structure required for an employee welfare benefit plan subject to ERISA. It is hardly credible to argue that Burlington's policy was a "plan" under ERISA where none of the characteristics of an ERISA plan are found. Burlington's severance pay policy is nothing more than the employer's agreement to pay severance wages as part of an employee's overall compensation and is not a "plan" covered by ERISA.

Support for the conclusion that every unfunded promise to pay severance pay or other benefits is not an ERISA plan can be found in many state court decisions that have awarded compensation based on theories of contract, promissory estoppel and *quantum meruit*.[5] Many state court decisions have specifically decided employee claims concerning severance pay policies in plant sale and closing situations and have made no reference whatsoever to ERISA. *See, Younger v. Thomas Int'l Corp.,*

[5] *See,* table of state court decisions attached to the Jurisdictional Statement of Appellants Irving Gilbert, *et al., as Appendix D.*

275 Ark. 327, 629 S.W.2d 294 (1982); *Armstrong v. Diamond Shamrock Corp.*, 7 Ohio App. 3d 296, 455 N.E.3d 702 (1982); *Adams v. Associates Corp. of N. America,* 390 So. 2d 539 (La. App. 1980); *Dulany Foods v. Ayers,* 220 Va. 502, 260 S.E.2d 196 (1979); and *Fentron Arch. Metals Div. v. Colavito,* 54 A.D.2d 857, 388 N.Y.S.2d 300 (1976).

Further, this Court has recognized the distinction between an employer that sponsors a plan and the separate entity of the plan itself in the case of *Nachman Corporation v. Pension Benefit Guaranty Corporation,* 446 U.S. 359, 100 S. Ct. 1723, 64 L. Ed. 2d 354 (1980). In *Nachman,* it was determined that while a liability disclaimer clause disclaimed any assumption of direct contractual liability by the employer to pay the unfunded portion of certain benefits, it did not make the employees' right to those benefits conditional as against the plan itself. The opinion contemplates that an employer can either choose not to establish a plan, in which case it can also choose whether or not to obligate itself to pay benefits out of its general assets, or, alternatively, it can choose to establish a plan and either assume or not direct liability for any deficiencies in plan assets. In either case, the extent to which the employer is *directly* liable to its employees is a question to be decided in accordance with the terms of the contract into which it has entered.

The *Nachman* analysis leads to four conclusions: (1) there is a meaningful distinction between "employers" and "plans"; (2) for an "employee welfare benefit plan" to be established or maintained within the meaning of the Act, it must be so constituted as to have an identity and character of its own, as distinct from that of the employer; and (3) to the extent that an employee seeks to enforce his rights as against a "plan," he must do so under ERISA, *see* 29 U.S.C. §§ 1132 and 1144(a); but (4) to the extent that he seeks to enforce any rights directly against his employer, his cause of action lies in contract. Hence, recovery of promised severance pay or other benefits from an employer, opposed to recovery

from a "plan," is not preempted by ERISA. Statutory and common law remedies remain viable and should not have been dismissed by the court below. Where an employer contracts to make certain payments or provide certain benefits out of its general assets, it is directly liable to make those payments and provide those benefits to its employees, and its employees are entitled to enforce that liability directly against the employer—in contract or under a state wage and benefit enforcement statute.

III. The Court Should Grant Full Consideration On Appeal To Resolve A Conflict Between Circuit Courts Of Appeals.

In the decision on appeal here, the Second Circuit Court of Appeals held that the preemption provision of ERISA precludes a lawsuit against an employer under state wage payment collection laws to enforce the employer's direct promise to make payments of benefits. The Third Circuit Court of Appeals, on the other hand, in *Carpenters Health and Welfare Fund v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279 (3d Cir. 1983), held that the preemption provisions of ERISA do not preclude a lawsuit against an employer under a state wage payment collection law to enforce an employer's direct promise to make payments into an ERISA-covered employee benefit plan. To the extent that one decision interprets ERISA to permit lawsuits under state law to enforce direct employer promises while the other does not, the decisions of these Circuits are in conflict, and it is appropriate for this Court to give full hearing to the present appeals in order to resolve that conflict.

In the *Ambrose* case, the Carpenters Health and Welfare Fund of Philadelphia and Vicinity (the "Fund") filed suit against Kenneth R. Ambrose, Inc. (Ambrose, Inc.) to recover delinquent contributions owed to the Fund under a collective bargaining agreement. Recovery was sought under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1976).

A pendent state claim was also sought to recover the contributions and to collect liquidated damages equal to 25% of the amount owed, as provided under the Pennsylvania Wage Payment Collection Law ("WPCL"), PA. STAT. ANN. tit. 43, § 260.1–.11 (Purdon Supp. 1983–84). The district court held Ambrose, Inc., liable both for the delinquent contributions under the LMRA and the WPCL, and for the 25% liquidated damages under the WPCL. On appeal to the Third Circuit, Ambrose, Inc., argued that the WPCL was preempted by the LMRA and ERISA. The Court of Appeals dismissed this contention outright:

> The Ambroses also argue that the district court acted without jurisdiction on the WPCL claims and they further contend that the WPCL is preempted by the LMRA and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a) (1976), *amended by* the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1145 (Supp. V–1981), we find that these contentions are without merit.

Carpenters Health and Welfare Fund v. Kenneth R. Ambrose, Inc., supra, 727 F.2d at 282, n.5. Thereafter, the Circuit Court upheld the district court's award of delinquent contributions and liquidated damages under the WPCL.

The Third Circuit does not state in its *Ambrose* opinion a rationale for rejecting ERISA preemption of the Pennsylvania WPCL. While this could be taken as a sign of a lightly considered decision, the better explanation would appear to be that the Third Circuit thought the question had been adequately considered and explained in its earlier decision in *Murphy v. Heppenstall Co.,* 635 F.2d 233 (3d Cir. 1980, *cert. denied,* 454 U.S. 1142 (1982). In that case, retired employees sued their employer to recover the difference between pension payments guaranteed by the Pension Benefit Guaranty Corporation and those provided for in a pension agreement

which had resulted from collective bargaining. The United States District Court for the Western District of Pennsylvania granted partial summary judgment in favor of the plaintiff-retirees on the issue of liability and, on appeal under 28 U.S.C. § 1292(b), the Third Circuit affirmed.

In rejecting the defendant's argument that ERISA had preempted contract claims against an employer for sums in excess of those guaranteed by the PBGC, the Court construed *Nachman, supra,* as having, by negative implication affirmed the continuing vitality of direct contractual liability:

> [If *Nachman* stands for the proposition that an] employer may limit direct liability [and it does], direct liability must persist under ERISA. Otherwise *Nachman* would nonsensically permit restrictions on a form of liability the statute had precluded.

Murphy, supra, 635 F.2d at 239 (material in brackets added).

Not content to rely on *Nachman* alone, the Court resorted to an examination of the statute itself to ascertain whether there was any inconsistency between the principle of direct contractual liability and the specific provisions and history of the Act. It concluded that there was no inconsistency:

> It is not inconsistent with the statutory scheme to permit employees to recover directly from the employer any additional benefits to which the employer has contractually obligated itself. While the effect of permitting that additional recovery may reduce the employer's net worth, and thus decrease the amount the PBGC may recover from the employer, the PBGC in its amicus brief to this court has taken a position supporting the employees' right to recover directly from the employer. Because nothing in

> ERISA, nor in its legislative history, nor in the views expressed by the government corporation charged with administering ERISA-guaranteed pension payments discountenances direct contractual recovery of pension benefits from the employer, we will affirm the district court's grant of summary judgment of liability in favor of the employees.

Murphy, supra, 635 F.2d at 239.

Taken together, the *Ambrose* and *Murphy* decisions stand for the proposition that "direct employer liability" is "direct employer liability" regardless of the existence of an ERISA benefit plan. Where an employer contracts to make certain payments or provide certain benefits out of its general assets, it is directly liable to make those payments and provide those benefits to its employees, and its employees are entitled to enforce that liability directly against the employer—in contract or under a state wage and benefit enforcement statute.

These pronouncements of the Third Circuit directly conflict with the decision below in the Second Circuit, which holds that attempts to enforce direct employer liability under state law are precluded by ERISA's preemption of the state laws. Insofar as this conflict exists and will result in inconsistent application of federal law within the various circuits,[6] this Court should exercise its authority to resolve the conflict by granting full consideration to these appeals.

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[6]Recent decisions highlight these inconsistencies. On January 26, 1985, the Western District of Pennsylvania, citing the *Ambrose* decision, allowed recovery under Pennsylvania's WPCL of an employer's delinquent contributions to an ERISA employee benefit plan despite the employer's contention that ERISA preempted the state statute. *Amalgamated Cotton Garment & Allied Industries Fund v. J.B.C. Company of Madera, Inc.,* 27 WH Cases 474 (W.D. Pa. 1985). On September 3, 1985, the Fourth Circuit Court of Appeals, citing the Second Circuit's decision in this case upheld an

[Footnote continued]

CONCLUSION

For all of the foregoing reasons, this Court should summarily reverse the opinion of the court below or grant plenary consideration of the significant question raised by the appeals of the private plaintiffs and the New York Commissioner of Labor who are the appellants in this action.

This the 16th day of October, 1985.

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employer's contention that ERISA preempts state laws under which employees were seeking to enforce direct employer liability for employee benefits. *Slack and Brooks v. Burlington Industries, Inc., supra.* Thus, a sharp line is being drawn between the decisions in these circuits on the question of whether direct employee promises can be enforced under a state law where ERISA is involved.

APPENDIX

APPENDIX

SUMMARY DESCRIPTION OF WAGE PAYMENT LAWS OF ALASKA, CONNECTICUT, DISTRICT OF COLUMBIA, HAWAII, ILLINOIS, MARYLAND, MONTANA NORTH CAROLINA, OKLAHOMA, VERMONT AND WISCONSIN

ALASKA

Alaska has two wage collection statutes. One provides specifically for actions arising from violations of the minimum wage and/or overtime laws. This statute is commonly referred to as the "Alaska Wage and Hour Act," and closely parallels the FLSA, 1938, as amended. See *AS 23.10.050–.150*

The second statute relates to wage claims, in general. See *AS 23.05.140–.260.* This statute is very similar to the New York statute in its content and administration. Claims accepted under this statute involve the contractual aspect of employment which deal with fringe benefits, primarily vacation or severance pay. An Alaska wage earner may choose a civil remedy either through the resources of the Department of Labor or on his own under a workman's independent right of action. The second remedy is exclusively used where the wages or benefits in question exceed the department's statutory minimum, exclusive of penalties, of $5000. The Department has the authority to use internal administrative adjudication processes to resolve complaints. These processes, however, are not obligatory and the Department may move a claim directly into the courts for a final solution.

The courts are generally reserved for serious disputes or for employers subject to recidivism. Most claims are handled quickly using one or more informal conferences involving an investigator, the claimant, and the employer or employer representative, frequently an attorney. The more formal hearing process is reserved for fact finding to clarify complicated questions of law, or to determine if criminal as well as civil sanctions are in order.

In Alaska there are currently 12 investigators and 4 technicians who investigate claims for wages and benefits or enforce other labor laws. The Department investigates and resolves 1600 claims per year with the average resolution time, outside of court, being 5 months. It may take from 7 months to 2 years to litigate a claim depending on the amount of the claim and legal complexities which dictate whether the matter will be heard at the district or superior court level. About 10 percent of the Department's cases require formal litigation for resolution. The Department's resources are without charge to the claimant while legal fees in the private sector begin at about $85 per hour.

CONNECTICUT

The Connecticut Commissioner of Labor, through the Department of Labor, Division of Regulation of Wage, oversees enforcement of Connecticut's wage payment laws, sections 31-71a through 31-71i, 31-72 and 31-76k, Connecticut General Statutes. Specifically, § 31-76k requires an employer to pay terminated employees all accrued fringe benefits where the employer has a policy or is party to a collective bargaining agreement providing for payment of such benefits upon termination. The fringe benefits covered by section 31-76i include vacations, holidays, sick days and severance pay. When the Department of Labor receives a complaint from a

terminated employee that promised fringe benefits have not been paid, it engages in an administrative investigation through the mails or in person using one of its six Wage Employment Agents. An administrative hearing may be held if necessary to determine disputed issues. When it determines that an employer has unlawfully failed to pay fringe benefits, the Department of Labor can initiate either a criminal action § 31–71g or a civil action under § 31–72 to collect double damages.

District of Columbia

The District of Columbia Wage Payment and Wage Collection Law, 36 D.C. Code §§ 101–110 (1981 ed.) enacted by Congress in 1956 (70 stat. 976), requires employers to make timely payment of wages to employees employed in the District of Columbia.

When an employer fails to pay wages (including vacation pay and severance pay) as required, an aggrieved employee has two recourses: he or she may file an action in court to recover the unpaid wages and liquidated damages, or file a complaint with the Office of Wage–Hour, D.C. Department of Employment Services. If the employee chooses the latter course, the employer is notified by letter of the filing of the complaint and the date and time of an administrative hearing. If a determination is made that the employer is in violation of the law, and refuses to pay the wages found due, the case is transferred to the Corporation Counsel of the District of Columbia for filing of criminal charges or a civil action.

With a staff of 4 wage–hour compliance specialists assigned to investigate complaints and conducting administrative hearings, the staff during the past 5 years (1980–84) has processed 4,564 complaints from employees alleging violation of the Wage Payment and Wage Collection Law. Slightly more than 1 million dollars has been recovered in unpaid wages and damages for employees.

HAWAII

In Hawaii, an employee who is not paid all wages due may either file a claim with the State of Hawaii's Department of Labor and Industrial Relations or bring a civil action in a state court to recover any monies owed.

The Department of Labor and Industrial Relations, under the statutes and administrative rules and regulations relating to the Payment of Wages and Other Compensation Law, Chapter 388, Hawaii Revised Statutes, investigates and conciliates unpaid wage claims including vacation, sick, and severance pay. The law does not require the employer to pay any set amount as pay and benefits, but only to pay what the employer has promised to pay to the employee. If, after an investigation substantiating a claim for unpaid wages or other compensation is completed and the employer fails or refuses to pay the employee, the Department of Labor and Industrial Relations may file a lawsuit on the employee's behalf to collect the amounts owed. If the Department prevails in the lawsuit, the Department may recover, in addition to the unpaid wages, a penalty in an amount up to the amount of the wages due. The court must also order the employer to pay the costs of bringing the action and reasonable attorney's fees.

When the employee brings a civil suit, the employee, too, may recover the civil penalties as well as the costs and reasonable attorney's fees.

The statute also provides for criminal penalties. It is a misdemeanor for any employer to fail to pay wages under the Payment of Wages and Other Compensation Law or for any officer of a corporation to knowingly permit the corporation to fail to pay wages. The employer or officer is subject to a fine of not less than $100 or more than $10,000.

Seven investigators investigate and conciliate the approximately 1,200 claims which are filed each year with the Department. Approximately 90 cases were referred to the Attorney General for legal action during the last completed fiscal year.

Any complaint filed under ERISA is not accepted in Hawaii but must be filed in Washington, D.C. with the Division of Inquiries and Technical Assistance. Whether or not prompt action is taken on these complaints is not known. Therefore, it is very important to the people of Hawaii that the Payment of Wages and Other Compensation Law continue to be applicable in the area of wages and benefits.

Illinois

The Wage Claim Division of the Illinois Department of Labor is responsible for enforcing the Wage Payment and Collection Act, Ill. Rev. Stat., Ch. 48, pars. 39m–1 to 39m–16 (1983).

Section 2 of the Act includes in its definitions of "wages" and "final compensation" any compensation owed an employee by an employer pursuant to an employment contract or agreement between the two parties. Even before this language was added to the statute, an Illinois appellate court construed the Act as covering severance pay claims.

Section 11 of the Act outlines the duties and powers of the Department, which include the authority to take assignments of wage claims and proceed civilly and to cause criminal complaints to be prosecuted. The statute also preserves a private right of action.

Workers who want to file a claim for wages or final compensation fill out a short application form. If the Division has jurisdiction, it writes to the worker's employer and asks for payment or a written response to the claim.

If the employer fails to respond, or if the worker disputes the response, the Wage Claim Division schedules a hearing in one of nine cities: Chicago, Springfield, Rockford, Peoria, Champaign, Marion, Collinsville, Rock Island or Effingham. At the hearing, a labor conciliator listens to both sides and examines any witnesses or written evidence. If the worker and employer do not reach a voluntary settlement, the conciliator either dismisses the claim or issues a demand for payment.

If the employer fails to comply with the demand, the Division institutes prosecution. An employer convicted of violating the Wage Payment and Collection Act can be sentenced to 30 days in jail or fined $500.00 for each day on which a violation occurs.

During the fiscal year ending June 30, 1984, the Illinois Department of Labor received 10,528 wage complaints claiming $15,498,980 due. Of this amount $3,786,232 involved vacation pay, severance pay or other fringe benefits. The Department held 8,827 hearings on wage claims during that year and resolved complaints involving $13,977,315. All of this was accomplished with a staff of fourteen.

Maryland

The intent of the Maryland Wage Payment and Collection Law is to provide a quick, simple method for employees to collect monies which were due them for services performed without cost to the employee. There are, of course, other remedies available to employees.

These remedies are, in most instances, time-consuming and involve either considerable cost to the employee or require certain knowledge which the employee does not have. A court date for a civil suit in the lowest state court is usually two to three months in the future. A fee of $250.00 is the minimum charged by an attorney to prepare and litigate even the simplest civil suit. Even with the loose and informal procedures in the small claims court, the employee generally does not have the knowledge to pursue his claim.

The vast majority of claims are for relatively small amounts, usually two weeks pay or less. The claimants are generally in the lowest paid jobs, many working at minimum wage. In 1983, the average amount collected per valid claim was $297.18.

The nature of these claims mandates that they be resolved as quickly as possible. The vast majority of cases received by the Employment Standards Service are resolved within 30 days. An administrative assistant and two clerical employees conduct the office functions; office and field functions are supervised by a Wage and Hour Investigator Supervisor. Approximately 40 percent of all claims are investigated by three specialists; the remainder are assigned to 16 other investigators in their areas of residence. Generally, the issues involved are emotional, requiring the investigator to exercise extreme tact and diplomacy to resolve the claim quickly and to the reasonable satisfaction of both parties. Because of the variety of employers involved, each investigator must have a broad business background.

The Wage Payment and Collection Law is codified as Article 100, Section 94, *Annotated Code of Maryland.* Subsection 94(4)(3) defines wages as "any remuneration, compensation, bonus, commission, and/or fringe benefit

When a wage claim is received in the office of the Labor Standards Division of the Montana Department of Labor and Industry, an investigation is commenced and a determination reached, if possible, of the validity of the claim.

In the event that either the claimant or respondent feels aggrieved by the determination, they have the right to a hearing. The hearing would be held under the Montana Administrative Procedure Act with rules of civil procedure and evidence applying.

If either party feels aggrieved by the decision of the hearing officer, the only appeal is to the District Court for judicial review. The Labor Standards Division may apply to District Court for a judgment or an order enforcing the decision of the hearing officer or a default order. (*See,* Section 39–3–212, MCA.)

Employers doing business in Montana are not required by law to provide vacation pay, but once promised or made part of the employment agreement that promise must be complied with. *See,* Attorney General's Opinion No. 56, September 17, 1949. Once earned, the vacation pay cannot be withheld by the employer or forfeited by the employee. Similarly, severance pay is not required by law to be given but meets the definition of wages once it's made part of the employment agreement.

In fiscal years 1982–1984, the Montana Department of Labor and Industry handled over 3,000 claims and collected over $1,400,000 in wages and fringe benefits owed.

North Carolina

The North Carolina Wage and Hour Act is similar but not identical to New York's statute. If an employee in that state fails to pay an employee all severance wages due, the employee can file a suit on his own under the Wage and Hour Act, or he can file a complaint with the Wage and Hour Division of the North Carolina Department of Labor. If he chooses the latter, the employee draws on the resources of an administrative agency with eighteen compliance officers stationed throughout the State whose primary function is to investigate and conciliate wage payment complaints. Should an employer refuse to pay a claim substantiated by a compliance officer, an administrative process commences which includes an opportunity for a hearing and a final agency determination. If the final decision upholds the claim and the employer still refuses to pay, the employee may request the Department of Labor to file a lawsuit on his behalf to recover the unpaid wages and exemplary damages. The North Carolina Wage and Hour Division investigates over 2,000 such complaints per year and answers the questions of many other potential complainants and employers before a problem develops. Many of the complaints involve unpaid severance pay, vacation pay or other payroll practices.

If a North Carolina employee were restricted to making an ERISA claim only, the resources available to assist him would be much less. The branch of the U.S. Department of Labor which administers ERISA is the Labor Management Services Administration.

OKLAHOMA

Title 40 Oklahoma Statutes 1982—Section 165.1(3) defines wages as follows:

> "Wages" means compensation owed by an employer to an employee for labor or services rendered, including salaries, commissions, holiday and vacation pay, overtime pay, severance or dismissal pay, bonuses and other similar advantages agreed upon between the employer and the employee, which are earned and due, or provided by the employer to his employees in an established policy, whether the amount is determined on a time, task, piece, commission or other basis of calculation.

Under Oklahoma law, holiday pay, vacation pay, severance pay, dismissal pay, bonuses and other similar advantages agreed upon between the employer and the employee which are agreed on as an established policy are wages.

Title 40, Oklahoma Statutes 1975, Section 165.11 defines the penalty for failure to pay wages or wage supplements:

> A. In addition to any other penalty or punishment otherwise prescribed by law, any employer who is a voluntary party to or subject to a bona fide written agreement to pay or provide benefits or wage supplements to employees or to a third party or fund for the benefit of employees and who willfully fails, neglects or refuses to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty (30) days after such payments are required to be made by law or by agreement, shall be guilty of a misdemeanor, and each such failure to make payment as required herein shall constitute a separate offense.

Where such employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions shall each be guilty of a misdemeanor.

B. As used in this section, the term "benefits or wage supplements" includes, but is not limited to, reimbursement for expenses as agreed prior to contracting said expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay.

Oklahoma's wage complaint procedures involves:

(1) A letter apprising the employer of the wage complaint, reciting the law and the criminal remedy and asking that the employer respond or pay.

(2) If after the 2nd notice to employer we feel the wages are due and owing based upon the facts, we ask the District Attorney to prosecute. Penalty for failure to pay wages is a misdemeanor—*punishment is up to a $500.00 fine, one (1) year in the county jail, or both.*

In 1983, the Oklahoma Department of Labor received 3,058 claims. During that same year, the Department collected approximately $500,000 on 1,197 claims and referred to civil or criminal court an additional 1,147 claims involving more than $1,000,000.

VERMONT

In Vermont, when an employer has a written policy or other written agreement to pay its employers benefits or wage supplements, then, upon failure to pay such benefits, the employer becomes liable to its employees for actual damages and, in the event of fraud, is subject to criminal prosecution. *See* Title 21, Vermont Statutes Annotated, Section 345a.

A terminated employee who has failed to receive severance pay pursuant to his employer's written policy or agreement may complain to the Wage and Hour Division of the Department of Labor and Industry for assistance. The Wage and Hour Division will investigate the claim and attempt to resolve it on an informal basis. Approximately two thirds of the complaints made to that division are resolved this way. If the unresolved complaint involves fraud, the Department of Labor and Industry will pursue criminal charges against the employer. If no fraud is involved, the employee is told of his right to sue for actual damages, and the Department's investigation file is made available for his use in the lawsuit.

WISCONSIN

The Wisconsin Department of Industry, Labor and Human Relations enforces Chapter 109, Wisconsin Statutes, "Wage Payments, Claims and Collection." This chapter requires employers to pay to every employee, at least once per month or within 15 days after termination, all wages earned. For the purpose of Chapter 109, "wages" are defined to mean remuneration payable to an employee for personal services, including salaries, commissions, holiday and vacation pay, overtime pay, severance or dismissal pay, bonuses, and other similar advantages agreed upon between the employer and the employee or provided by the employer to the employees as an established policy. The Department investigates and tries to adjust controversies between employers and employees as to alleged wage claims. If the Department finds wages are due and an employer refuses to pay, it may file a lawsuit against the employer when the employee has assigned his claim to the Department. Chapter 109 grants a lien to the Department upon the property of an employer for the full amount of any wage claim

assigned to it. This lien is given precedence over all other debts, judgments, decrees, liens or mortgages against the employer. In a case where an employer fails to pay wages as required by Chapter 109, he is subject to both criminal penalties and increased liability of up to 50% of the wages owed. While precise statistics are not available, a significant portion of the wage claims investigated by the Department under Chapter 109 are severance pay claims.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this day served three (3) copies of the foregoing Brief of the States as *Amici Curiae* Supporting Appellants upon the persons indicated below by depositing same in the United States mail, first-class postage prepaid, addressed to the following:

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